Supreme Court, U.S.
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82-1988

No. -------

In the Supreme Court of the United States

OCTOBER TERM, 1982

BRUCE TOWER, Public Defender of Douglas County, Oregon, and

GARY BABCOCK, Public Defender of the State of Oregon,

Petitioners,

v.

BILLY IRL GLOVER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
***JAMES E. MOUNTAIN, JR.**
Deputy Solicitor General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Whether 42 U.S.C. § 1983 authorizes a convicted person to assert a claim for damages against the public defenders who represented him at his criminal trial and appeal, on a theory that the public defenders deprived him of his constitutional rights pursuant to a conspiracy with state judges and administrative officials.

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Petitioner Bruce Tower, the Public Defender of Douglas County, Oregon, and petitioner Gary Babcock, the Public Defender of the State of Oregon, respectfully pray that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Billy Irl Glover v. Bruce Tower, Public Defender of Douglas County, Oregon and Gary Babcock, Public Defender of the State of Oregon*, No. 81-3199 (March 1, 1983).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in this matter is reported as *Glover v. Tower*, 700 F2d 556 (9th Cir. 1983). In its opinion and ensuing judgment, the Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the United States District Court for the District of Oregon which had dismissed respondent Glover's civil rights action for failure to state a claim. The opinion of the Ninth Circuit Court of Appeals is attached to this opinion as Appendix A. The unreported order of the United States District Court for the District of Oregon is attached as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on March 1, 1983. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of

Appeals judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for a writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The resolution of the issue presented in this petition involves the Sixth and Fourteenth Amendments of the United States Constitution and the federal statute authorizing civil actions for deprivation of rights, 42 U.S.C. § 1983.

United States Constitution, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."

United States Constitution, Amendment XIV provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *"

STATEMENT OF THE CASE

1. Summary of Facts

While he was incarcerated in the Oregon State Penitentiary, respondent Glover filed an action under 42 U.S.C. § 1983 against Douglas County Public Defender Bruce Tower and Oregon State Public Defender Gary Babcock. (Cr. 3, pp. 1, 2). Glover's *pro se* complaint was made on a form provided by the United States District Court for the District of Oregon. (Cr. 3, p. 1). Glover complains of an alleged "conspiracy by state officials acting under a color of state authority to deprive [him] of his civil rights . . .". (Cr. 3, p. 1). The gist of Glover's complaint is that his public defenders at trial and on appeal violated his constitutional rights by conspiring with trial judges, the judges of the Oregon Court of Appeals, and named and unnamed state administrative officials to secure and to sustain his conviction on a felony charge brought by the State of Oregon. (Cr. 10, p. 1).

Glover alleges that his trial attorney, petitioner Tower, a county public defender, conspired with state trial court judges to deprive Glover of his liberty by refusing to discharge the responsibilities and obligations of a court-appointed defense counsel. (Cr. 3, p. 3). Glover maintains that Tower conspired with state officials to prevent Glover from presenting a defense of mental disease or defect in his criminal prosecution. (Cr. 3, p. 4). Glover also claims that Tower participated in a conspiracy to deprive Glover of his right to defend himself by refusing to withdraw from the case. (Cr. 3, pp. 4-5).

With regard to the state court appeal of his criminal conviction, Glover alleges that petitioner Babcock, the state public defender, deliberately deprived Glover of a fair and adequate appeal. (Cr. 3, p. 5.). Glover maintains that Babcock refused to obtain printed portions of the trial record, prepared an inadequate opening brief, and refused to correct the brief upon Glover's request. (Cr. 3, p. 5). Glover alleges that public defender Babcock, as did public defender Tower, knowingly and deliberately deprived him of his basic civil rights to defend himself against serious criminal charges pursuant to a conspiracy. (Cr. 3, pp. 5-6).

Glover also alleges that members of the judicial and executive branch of Oregon government were involved in the conspiracy against him. He claims

that "state agents" not only persuaded petitioner Tower to do nothing to prepare for Glover's defense, but that they also persuaded trial court judges to ignore his requests for redress. (Cr. 3, p. 4). Glover alleges that the Oregon Court of Appeals intentionally participated in the conspiracy by accepting the appellate brief prepared by petitioner Babcock over Glover's objections and by refusing to allow Glover to represent himself during his appeal. (Cr. 3, Exhibit at 4, 5).

Glover maintains that the purpose of the conspiracy was to prevent his disclosure of dishonest actions by state officials. (Cr. 3, p. 5). He further alleges that the mastermind of the conspiracy was a former Oregon Attorney General who, in his capacity as a court of appeals judge, placed himself on the panel that reviewed Glover's criminal appeal. (Cr. 3, p. 6). In his complaint, Glover prays for no compensatory damages; he seeks $5 million in punitive damages from public defender Tower and the same amount from public defender Babcock.

A copy of Glover's complaint is attached as Appendix C to this petition.

2. Procedural History: Basis of Federal Jurisdiction

Respondent Glover's civil complaint under 42 U.S.C. § 1983 and other provisions of the Civil Rights Act was filed on December 12, 1980. (Cr. 3,

p. 1). Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, petitioner public defenders Tower and Babcock moved for dismissal of Glover's complaint on the ground that it failed to state a claim upon which relief could be granted. (Cr. 6, p. 1). In a memorandum supporting their dismissal motion, Tower and Babcock maintained that Glover's purported § 1983 action against them should be dismissed because, as public defenders, they were absolutely immune from liability under § 1983 for acts performed in representing a defendant in a criminal trial. (Cr. 6, pp. 2-4). Tower and Babcock expressly relied upon the opinion of the Ninth Circuit Court of Appeals in *Miller v. Barilla*, 549 F2d 648, 649 (9th Cir. 1977) in which the court held "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in performance of his judicial functions as a public defender." (Cr. 6, pp. 2-3).

On April 3, 1981, the United States District Court for the District of Oregon entered an order granting petitioners' motion to dismiss. (Cr. 10, p. 3; App. B, p. 3). Citing *Miller v. Barilla, supra*, the District Court ruled in its unreported order that ". . . plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function." (Cr. 10, p. 2; App.

B, p.2). Thereupon, the District Court entered a judgment dismissing Glover's action. (Cr. 11).

On April 7, 1981, Glover filed a notice of appeal *pro se*. Glover filed a *pro se* opening brief. After petitioners Tower and Babcock filed an answering brief, the Court of Appeals appointed the Northwestern Legal Clinic of the Lewis and Clark College Northwestern School of Law to represent Glover on the appeal. The Court of Appeals set a revised briefing schedule, and counsel for the parties submitted supplemental briefs which addressed, among other issues, the question of the immunity of public defenders from liability for damages under § 1983.

The Ninth Circuit Court of Appeals heard oral arguments on this issue on December 7, 1982. In an opinion issued on March 1, 1983, a panel of the Court of Appeals reversed the portion of the District Court's order which had ruled that public defenders Tower and Babcock were immune from liability under § 1983. The panel reasoned that its precedent in *Miller v. Barilla, supra*, was no longer good law in light of this Court's subsequent decision in *Ferri v. Ackerman*, 444 US 193 (1979). The Ninth Circuit panel concluded "that *Miller* cannot survive the rationale of *Ferri*, and that "*Ferri* and *Polk County v. Dodson*, [454 US 312 (1981)], are inconsistent in principle with any immunity qualified or absolute, of public defenders charged with conspiring with

state officials in violation of 42 U.S.C. § 1983. * * *" *Glover v. Tower, supra*, 700 F2d at 558, 559. (App. A, p. 5).

REASONS FOR ALLOWANCE OF WRIT

This case presents an important issue of federal law which should be settled by this Court. The question whether public defenders are immune from liability under 42 U.S.C. § 1983 for their actions in representing indigent defendants in the course of criminal prosecutions was left open by this Court in *Polk County v. Dodson, supra*, 454 US at 317, n. 4. The public defender immunity issue is squarely presented here.[1] The Ninth Circuit Court of Appeals incorrectly resolved this issue because it misconstrued and misapplied this Court's discussion in *Ferri v. Ackerman, supra*, of the immunity of appointed private defense counsel from state tort liability for malpractice. That case is distinguishable from a case such as this which involves the liability of appointed *public* defenders in federal

[1]The Court found that it need not reach this immunity issue in *Polk County v. Dodson*, because it there held that a public defender does not act under color of state law when performing the traditional functions of counsel for a criminal defendant. 454 US at 317, n. 4. The Ninth Circuit Court of Appeals, however, found that it was necessary to reach the immunity question in this case because Glover had somewhat vaguely but sufficiently alleged that public defenders Tower and Babcock conspired with state officials to deprive him of his constitutional rights. *Glover v. Tower, supra*, 700 F2d at 558, n. 1. (App. A, p. 6). Therefore, on the basis of this Court's decision in *Dennis v. Sparks*, 449 US 24, 29 (1980), the Court of Appeals concluded that Glover's complaint alleged a conspiracy sufficient to satisfy the color of state law requirement that this Court concluded was not satisfied in *Polk County v. Dodson, supra*. *Glover v. Tower, supra*, 700 F2d at 558, n. 1. (App. A, p. 6).

court under 42 USC § 1983. This Court should resolve the question of public defender immunity under § 1983 now. The Ninth Circuit decision in this case is in conflict with the decision of the Court of Appeals for the Third Circuit on the same issue in *Black v. Bayer*, 672 F2d 309 (1982). Review by this Court is particularly appropriate because, like the Ninth Circuit, the Court of Appeals for the Eighth Circuit has misapplied *Ferri* in cases involving the question of immunity of public defenders under § 1983[2]. Moreover, the absence of explanation or clarification from this Court regarding the scope of its *Ferri* decision has caused the Fourth Circuit to doubt the continued viability of the public defender immunity doctrine established in that circuit's prior cases.[3] Unless this Court allows review in this case, other circuit courts which have established the doctrine of public defender immunity[4] will face a similar quandary, as will judicial and administrative officials with responsibilities for supervising and managing the numerous state and local public defender programs across the country.

[2] *Dodson v. Polk County*, 628 F2d 1104, 1107 (8th Cir. 1980), *reversed on other grounds, Polk County v. Dodson*, 454 US 312 (1981).

[3] *See Hall v. Quillen*, 631 F2d 1154, 1155 (4th Cir. 1980), questioning the continued vitality of *Minns v. Paul*, 542 F2d 899 (4th Cir. 1976).

[4] *See Robinson v. Bergstrom*, 579 F2d 401 (7th Cir. 1978). *See also Housand v. Heimen*, 594 F2d 923 (2d Cir. 1979) (per curiam).

Discussion

1. **The issue of public defender immunity under § 1983 is an important federal question.** This Court's holding in *Polk County v. Dodson*, *supra*, that public defenders do not act under color of state law when providing criminal defense services, does not completely insulate the practice of the nation's public defenders from the deleterious effects of spurious lawsuits filed under § 1983 by unjustifiably disappointed criminal clients. In the present case, the Ninth Circuit reached its conclusion that public defenders were not absolutely immune under 42 U.S.C. § 1983 "with some reluctance" because the court was "mindful of the burden [its] decision may place on already overburdened public defenders' offices. * * *" *Glover v. Tower*, *supra*, 700 F2d at 559. (App. A, p. 5). The court evidently realized that unscrupulous clients of public defenders would simply avoid the implication of this court's opinion in *Polk County v. Dodson*, *supra*, by enhancing their purported § 1983 claims with unfounded allegations of conspiracies between their public defenders and various judicial, prosecutorial, and administrative officials. In order to prevent the paralysis of public defender decisionmaking and case processing by a flood of frivolous litigation, this Court should now

address the question of public defender immunity which it left open in *Polk County v. Dodson*.

2. **The Ninth Circuit Court of Appeals erroneously applied this Court's decision in *Ferri v. Ackerman* to this case.** The attorney involved in *Ferri*, was a *private* attorney appointed to represent an indigent criminal defendant in a federal criminal trial. This Court held that no principle of federal law required the state to accord such an attorney absolute immunity from liability in a state malpractice suit brought against the attorney by his former criminal client. *Ferri v. Ackerman*, *supra*, 444 US at 201, 205. This case does not involve private counsel. The attorneys whom respondent seeks to sue under § 1983 in this case are *public* defenders. In jurisdictions which have public defender programs, a significantly greater proportion of the responsibility for providing defense services to indigent criminal defendants is assigned to public defenders rather than private attorneys appointed on a case-by-case basis. Large numbers of indigent criminal defendants are assigned to public defenders because, generally, public defender programs can provide defense services at a lower cost to the public than can a private attorney-appointment system. A public defender system can provide defense services at lower cost and with greater efficiency because public defenders generally are specialists who limit their

practice to criminal law and related matters. The benefits of maintaining a public defender system carry a corresponding burden. This burden of representing a large number of exclusively indigent criminal defendants distinguishes public defenders from privately retained attorneys and private attorneys who occasionally are appointed to represent criminal defendants.

Although a public defender is not so much a part of the judicial system that his or her authority to make legal decisions for an indigent criminal defendant depends on state law, a public defender, as the name suggests, serves a public purpose. Efficient performance of the public defender function has a quantifiable, beneficial effect on the criminal justice system. In this particular sense, the defender's role, as contrasted with the role of appointed private counsel discussed in *Ferri*, is sufficiently "judicial" in nature to warrant the protection of absolute immunity afforded to other participants in the criminal justice system. *See Pierson v. Ray*, 386 US 547 (1967) (judges); *Imbler v. Pachtman*, 424 US 409 (1976) (prosecutors); *Briscoe v. Lahue*, ___ US ___ , 103 SCt 1108 (1983) (witnesses).

The Ninth Circuit's opinion in this case also fails to recognize that unlike *Ferri*, this case involves allegations of liability under *federal* law, to be adjudicated in *federal* court. In *Ferri*, this Court

emphasized that it was concerned only with the extent to which federal law *required* the states to accord immunity in state proceedings. The Court noted:

> "The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a state to decide the question of immunity in this situation in accord with its own law. We are not concerned with the elements of a state cause of action for malpractice and need not speculate about whether a state court would consider petitioner's allegations to establish a breach of duty or a right to recover damages. Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune. For when state law creates a cause of action, the state is free to define the defenses to that claim, including the defense of immunity, unless of course, the state rule is in conflict with the federal rule." 444 US at 197-198 (footnotes omitted).

Ferri v. Ackerman did not deal with the scope of the federal cause of action under 42 U.S.C. § 1983 or the extent to which it is limited in this context by federal immunity principles. *Ferri* addressed only the issue of federal preemption. This case presents the quite different issue of whether § 1983 provides a federal jurisdictional base for disgruntled indigent criminal offenders to sue their public defenders for malpractice. The Ninth Circuit discarded its own established, well-reasoned rejection of such a federal cause of action in reluctant deference to a decision of this Court which is not on point.

The Court should take the opportunity presented by this case to correct past misapplications of *Ferri* and to forestall future misapplications of that case in the context of cases presenting the issue of public defender immunity under § 1983.

3. **The approach taken by the Court of Appeals for the Third Circuit in *Black v. Bayer, supra*, is correct.** In the wake of this Court's decisions in *Ferri v. Ackerman* and *Polk County v. Dodson*, the Third Circuit Court of Appeals reaffirmed its long-standing rule that public defenders, acting within the scope of their professional duties, are absolutely immune from civil liability under § 1983. *Black v. Bayer, supra*, 672 F2d at 320. The court reached this conclusion after evaluating a number of policy factors. The court concluded that denial of absolute immunity to a public defender under § 1983 would discourage recruitment of new defenders and conceivably would encourage retirement by experienced public defenders. 672 F2d at 318-319, citing *Brown v. Joseph*, 463 F2d 1046, 1049 (3rd Cir. 1972). The court also noted that exposure of public defenders to § 1983 liability would interfere with the speedy and efficient performance of the defender's function. 672 F2d at 319. The Third Circuit has correctly resolved the issue present here.

Public defender programs have been instituted across this country in direct response to this Court's

decisions recognizing the Sixth Amendment right of indigent criminal defendants to court-appointed counsel. In 1961, two years prior to *Gideon v. Wainwright*, 372 US 335 (1963), public defender programs served only 3 percent of the nation's counties and approximately one-fourth of the nation's population. One year after *Agersinger v. Hamlin*, 407 US 25 (1972), public defender programs had been implemented in 28 percent of the nation's counties, to serve two-thirds of the population. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 Wis. L. Rev. 473, 481 n. 40; L. Benner & B. Neary, *The Other Face of Justice* 72 (1973). Public defender programs were created as a result of the tremendous increase in demand for proficient criminal defense attorneys and the recognition that some compensation of counsel would be required for adequate representation, that adequate criminal representation was not solely the gratuitous responsibility of the local bar, and that the community responsibility for providing defense services to indigents must be discharged with limited government resources. Mounts, *supra*, 1982 Wis. L. Rev. at 479-481.

Although public defenders owe definite allegiance to their individual clients, it also is evident that public defenders necessarily are subjected to significant and various additional pressures which require

difficult policy choices with respect to the representation of their clients. Faced with large case loads and limited resources, public defenders must make difficult decisions regarding allocation of limited time and resources with the objective of serving each client's needs as fully as possible. Unlike their clients, public defenders must be concerned with the serious difficulties of many criminal defendants and must have a commitment to the overall fairness of the criminal justice system which is as strong as their commitment to each client. It is therefore not surprising that many indigent criminal defendants come away from the adjudicative process with the mistaken belief that their public defenders do not care about them or even are conspiring for their criminal convictions.

In *Imbler v. Pachtman*, *supra*, 424 US at 422-423, this Court recognized that the doctrine of prosecutorial immunity was grounded in part upon "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. * * *" The same considerations apply with respect to public defenders.

Public defenders must exercise their independent professional judgment where conflicting interests

are at stake. To permit § 1983 lawsuits to be maintained against public defenders not only would impede the exercise of their independent judgment, it also would detract from their ability to perform their public duty. Defense of § 1983 lawsuits would divert their attention from performance of their criminal defense function. Although it is likely that only a very few *pro se* § 1983 lawsuits ever would be successful, the lawsuits themselves would require the public defender to devote time and energy away from the public function he or she should be performing. Any spurious § 1983 lawsuit which results in a loss of a public defender's time for providing defense services disserves the public interest in providing adequate criminal legal representation to the poor.

As noted by the Third Circuit, this Court, in *Polk County v. Dodson*, recognized the important policy considerations that have prompted lower courts to grant absolute immunity to public defenders.[5] This Court should grant review in this Ninth Circuit case in order to resolve the conflict among the circuits on the question of public defender immunity under §

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[5]The Third Circuit drew this conclusion from the following statement in *Polk County v. Dodson*, 454 US 312, 324, n. 17:

"* * * Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client. But confidence will not be improved by creating a disincentive for the states to provide post-conviction assistance to indigent prisoners. To impose § 1983 liability for a lawyer's performance of traditional functions as counsel to a criminal defendant would have precisely that effect."

1983. The Court should resolve the conflict by adopting and refining the rule and rationale of the Third Circuit in *Black v. Bayer*.

CONCLUSION

The Ninth Circuit Court of Appeals misinterpreted 42 U.S.C. § 1983 and this Court's recent decisions when it resolved the issue presented in this case. The significance of the issue of public defender immunity under § 1983 transcends this particular case. For all of the reasons discussed above, this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,
DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Solicitor General
JAMES E. MOUNTAIN, JR.
Deputy Solicitor General
Counsel for Petitioners

Appendix A

For Publication

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PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY IRL GLOVER,)

Plaintiff-Appellant,)

vs.) CA No. 81-3199
DC No. CV 80-6720

BRUCE TOWER, Public Defender of Douglas County, Oregon and GARY BABCOCK, Public Defender of the State of Oregon,) OPINION

Defendants-Appellees.)

Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni, District Judge, Presiding
Argued and Submitted December 7, 1982

Before: GOODWIN, PREGERSON and CANBY, Circuit Judges

CANBY, Circuit Judge:

Glover appeals the district court's dismissal of his civil rights action. The complaint, which was filed by Glover pro se, alleged that the public defenders who represented him in a prior state criminal action violated the provisions of 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) by conspiring with various public officials to violate his constitutional rights. The district court held that Glover had failed to state a claim upon which relief could be granted and dismissed his action.

Glover alleged that his public defenders at trial and on appeal violated his constitutional rights by conspiring with the trial judge, the Oregon Court of Appeals and other named and

unnamed state officials to secure his conviction on a felony charge brought by the State of Oregon. He alleged that defendant Tower intentionally failed to obtain evidence to support his defense of mental defect and refused to withdraw as counsel to allow Glover to represent himself. He further alleged the existence of a conspiracy between Tower and the trial judge to secure his conviction. In furtherance of that conspiracy, the trial judge allegedly denied Glover's motions for new counsel and for a new trial. The Oregon Court of Appeals is alleged to have participated in the conspiracy by accepting defendant Babcock's appellate brief over Glover's objections and by refusing to allow Glover to represent himself during the appeal.

Glover also alleged that Babcock, as public defender administrator, appointed himself to represent Glover on appeal to insure that his conviction would be upheld. Similarly, he alleged that Judge Lee Johnson had himself placed on the panel which was to hear Glover's appeal to insure that his conviction would be affirmed. Judge Johnson had been attorney general at the time of Glover's trial and was named to the Oregon Court of Appeals during the interim.

The district court held that Glover had failed to allege anything in the nature of racial discrimination, necessary for section 1981 and 1982 claims, or the type of class-based discrimination necessary for a section 1985(3) claim. No extended discussion of these holdings is required. The district court was correct and that portion of its judgment is affirmed. See London

v. Coopers & Lybrand, 644 F.2d 811, 818 n.4 (9th Cir. 1981); Griffin v. Breckenridge, 403 U.S. 88 (1971). Glover's contention on appeal that he was treated less favorably as an indigent than he would have been had he been affluent enough to retain his own lawyer does not, in our view, make out a proper class-based 1985(3) claim.

The district court also held that Glover's remaining claim under section 1983 failed to state a cause of action because public defenders are absolutely immune from suit under section 1983. That portion of the court's ruling was error and we reverse.

In Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), this court adopted the rationale of Minns v. Paul, 542 F.2d 899 (4th Cir.), cert. denied, 429 U.S. 1102 (1976), and announced a rule of absolute immunity for public defenders under section 1983. We reasoned that absolute immunity would encourage able lawyers to represent indigents and encourage counsel in "the full exercise of professionalism . . . ." Miller v. Barilla, 549 F.2d at 649 (quoting Minns v. Paul, 542 F.2d at 901). We concluded that there was no valid reason to treat public defenders differently from prosecutors and judges in this regard.

The district court understandably felt itself bound by Miller.[1/] Our review of a subsequent Supreme Court case, Ferri v. Ackerman, 444 U.S. 193 (1979), has convinced us that Miller is no longer good law. In Ferri, the Court held that an attorney appointed to represent an indigent criminal defendant in a federal prosecution was not entitled , as a matter of federal law, to

absolute immunity in a subsequent state malpractice action. The Court explained that appointed counsel are subject to the same duties and obligations as retained counsel. The Court distinguished the public defender from a judge or prosecutor, noting that the latter serve broad societal interests and are subject to conflicting claims. Immunity is necessary to forestall an atmosphere of intimidation, and to insure that they have maximum ability to deal fearlessly with the public. In contrast, the public defender is obligated to serve the undivided interest of his client. See Sellars v. Procunier, 641 F.2d 1295, 1299 n.7 (9th Cir.), cert. denied, 102 S.Ct. 678 (1981); see also Polk County v. Dodson, ___ U.S. ___, 102 S.Ct. 445 (1981)(public defender is the functional equivalent of a privately retained attorney).

Ferri did not actually overrule Miller because the issue presented was limited to federal preemption of state law governing immunity in malpractice actions. See Black v. Bayer, 672 F.2d 309 (3d Cir. 1982)(reaffirming rule of absolute immunity for public defenders). Nonetheless, the Ferri Court's refusal to extend the immunity accorded judges and prosecutors to appointed counsel undercuts the basis for Miller. See Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980)(Ferri casts considerable doubt on the continuing validity of Minns), cert. denied, 102 S.Ct. 999 (1982); White v. Bloom, 621 F.2d 276, 280 (8th Cir. 1980)(public defenders subject to suit under section 1983), cert. denied, 449 U.S. 995 (1980), 449 U.S. 1089 (1981).

We conclude that Miller cannot survive the rationale of Ferri, and that Ferri and Polk County v. Dodson, supra, are inconsistent in principle with any immunity, qualified or absolute, of public defenders charged with conspiring with state officials in violation of 42 U.S.C. § 1983. We reach this conclusion with some reluctance, because we are mindful of the burden our decision may place on already-overburdened public defenders' offices. Nevertheless, we can construe Ferri and Polk County no other way.

AFFIRMED in part, REVERSED in part and REMANDED.

Footnotes

1. The district court did not address the preliminary issue of whether Glover alleged that defendants acted under color of state law. "[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Polk County v. Dodson, ___ U.S. ___, 102 S.Ct. 445, 453 (1981). Thus a suit alleging constitutional violations on the part of a public defender acting alone would not state a claim under section 1983. In this case, however, Glover alleged that the public defenders conspired with state officials. Private parties who conspire with a state official acting in his official capacity do act under color of state law. Dennis v. Sparks, 449 U.S. 24, 29 (1980). In Sparks, the Court held that a complaint which alleged a conspiracy between a state judge and two private defendants to cause an injunction to be corruptly issued, satisfied the color of state law requirement. Glover's allegations of conspiracy were somewhat vague. On remand the district court may require more specificity, but at this stage we are satisfied that Glover's allegations of color of state law are not fatally deficient on their face.

Appendix B

FILED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BILLY IRL GLOVER,

Plaintiff, Civil No. 80-6720-E

v. ORDER

BRUCE TOWER, and
GARY BABCOCK;

Defendants.

Billy Irl Glover, plaintiff, brings this civil rights action pursuant to 42 U.S.C. 1981, 1982, 1983 and 1985(3), alleging that his public defenders at trial and on appeal inadequately represented him, and conspired with the trial judge and other unnamed officials to secure his conviction of a felony. Plaintiff is presently incarcerated in the Oregon State Penitentiary.

Defendants deny that plaintiff has stated a claim for relief, and move for dismissal.

Plaintiff has not stated a claim under 42 U.S.C. § 1981 or 1982 because he has not alleged a racially-motivated deprivation of rights or property. Des Vergnes v. Seekonk Water District, 601 F.2d 9 (1st Cir. 1979); Jones v. Mayer, 392 U.S. 409 (1968).

Plaintiff has not stated a claim under 42 U.S.C. § 1985(3) because he has not alleged that the conspiracy was founded upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Griffin v. Breckenridge,

403 U.S. 88, 102 (1971).

Finally, plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function. Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Housand v. Heiman, 594 F.2d 923 (2nd Cir. 1979).

Plaintiff contends that defendants were acting outside the scope of their immunity when they conspired to secure his conviction. As evidence of this conspiracy, he claims that defendants failed to obtain certain evidence and witnesses to support his defense of mental defect or disease, and refused to withdraw as counsel, in order to allow plaintiff to represent himself. Plaintiff further alleges that the trial judge aided in the conspiracy by refusing to grant his motions for appointment of new counsel and for a new trial. The appellate court allegedly participated in the conspiracy by accepting defendant Babcock's brief, and by refusing to allow plaintiff to represent himself.

Plaintiff's claim fails to allege any actions by defendants which lie outside the scope of their judicial function. For purposes of 42 U.S.C. § 1983, public defenders have "unfettered discretion" in their decisions regarding the introduction of evidence, the presentation of witnesses, and the submission of motions.[1] Therefore, plaintiff's allegations do not strip defendants of their absolute immunity.

1/ Miller v. Barilla, 549 F.2d at 649; Housand v. Heiman, 594 F.2d at 924-925.

Defendants' motion to dismiss is granted and this proceeding is dismissed. The Clerk is directed to enter judgment accordingly.

DATED this 1st day of April, 1981.

U.S. DISTRICT JUDGE

Appendix C

THE ORIGINAL COPY

Billy Irl Glover
#47831
405 State Street
Salem, Oregon 97310
IN PRO PER

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

In the United States District Court
For the District of Oregon

BILLY IRL GLOVER, Plaintiff

[Enter above the full name of the plaintiff in this action.]

v.

BRUCE TOWER, Douglas County Public Defender
GARY BABCOCK, Oregon State Public Defender
Defendants

[Enter above the full name of the defendant or defendants in this action.]

U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED
DEC 12 1980
ROBERT M. CHRIST, CLERK
DEPUTY

COMPLAINT

Civil No. 80-6720-E

ACTION UNDER TITLE 42 U.S.C. 1983, 1981, 1982 & 1985 (3) & related statutes governing CONSPIRACY BY STATE OFFICIALS ACTING UNDER COLOR OF STATE AUTHORITY TO DEPRIVE PLAINTIFF OF HIS CIVIL RIGHTS AS OUTLINED HEREIN.

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes [ ] No [X]

BUT THERE IS A RELATED CASE PRESENTLY BEING LITIGATED (Your File # 80-6371-E)

B. If your answer to A is yes, describe the lawsuit in the space below. [If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.]

1. Parties to this previous lawsuit

Plaintiffs N/A

Defendants N/A

2. Court [if federal court, name the district; if state court, name the county]
N/A

3. Docket number N/A

4. Name of judge to whom case was assigned N/A

5. Disposition [for example: Was the case dismissed? Was it appealed? Is it still pending?]
N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition N/A

II. Place of Present Confinement OREGON STATE PENITENTIARY

A. Is there a prisoner grievance procedure in this institution?
Yes [XX] No [ ]

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes [ ] No [XX]

C. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

D. If your answer is NO, explain why not This is NOT a prisoner grievance type suit but a suit against other officials acting under state authority.

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? ~~xx Yes xx No~~ N/A

F. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

II. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of Plaintiff BILLY IRL GLOVER

Address BOX 42831, 2605 State Street, Salem, Oregon 97310

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant BRUCE TOWER is employed as COUNTY PUBLIC DEFENDER at DOUGLAS COUNTY CIRCUIT COURT, 1 COURTHOUSE, ROSEBERG, OREGON

C. Additional Defendants GARY BABCOCK who is employed as the Oregon State Public Defender, 1655 State Street, Salem, Oregon 97310

IV. Statement of Claim

[State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

Bruce Tower, acting as a representative of the State of Oregon in the capacity of the Douglas County Public Defender conspired with other state officials - - including the trial court judges of Charles Woodrich and Robert Stults, who are unnamed defendants in this action since judges are immune from damages even though done with malice and forethought - - to deprive your plaintiff of his liberty by refusing to discharge his responsibilities and obligations as court appointed counsel for your plaintiff in the Douglas County Circuit Court case No. 76-0386.

(SEE ADDITIONAL INFORMATION IN THE ATTACHED SUPPLEMENT TITLED "IV Statement of Claim."

V. Relief

[State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.]

From defendant Bruce Tower plaintiff asks the court to award punative damages in the amount of $5 million.

From defendant Gary Babcock plaintiff asks the court to award punative damages in the amount of $5 million.

Signed this 30th day of October, 1980.

Billy Joe Hays
[Signature of Plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

10/30/80
[Date]

Billy Joe Hays
[Signature of Plaintiff]

Certified A True Copy

IV). Statement of Claim (Contd. from page 3)

This is more than a mal-practice situation by defendant Bruce Tower as he conspired with and acted in unison with other state officials to prevent your plaintiff from mustering, preserving and presenting his defense in a criminal case in Douglas County (Circuit Court No. 76-0386).

In the criminal case referred to the defense proffered was THE AFFIRMATIVE DEFENSE OF MENTAL DEFECT OR DISEASE WHICH DIMINISHED OR NEGATED CRIMINAL RESPONSIBILITY.

There was ample evidence of the validity of this defense available to defendant Bruce Tower. During the entire six months defendant Tower had to prepare for the trial in the Circuit Court for Douglas County your plaintiff insisted on and pleaded with defendant Tower to search out and investigate the defense and to secure evidence that was needed; contact witnesses pertinent to the case; secure past psychiatric reports; and to otherwise research and prepare the defense.

However, state agents pursuaded defendant Tower to do nothing to prepare for the defense so that there would be a guaranteed conviction of your plaintiff. These same state agents pursuaded the trial court judges of Charles Woodrich and Robert Stults to ignore your plaintiff's every request for redress in the Douglas County Circuit Court so that these serious Constitutional errors could be corrected and your plaintiff could defend himself against those charges.

The reason those other state agents got involved in this criminal case was because your plaintiff needed certain documents from those state agents and their agencies (COMPARE FILE # 80 - 6371-E for the background setting for this case).

For the background information as to the manner in which defendant Tower carried out this conspiracy to deprive your plaintiff of his basic rights to defend himself, the Court is referred to exhibit # 1 attached which gives a rather thorough account of how this conspiracy was carried out.

Once the attached exhibit # 1 is studied it becomes evident that defendant Tower NEVER INTENDED TO ALLOW YOUR PLAINTIFF TO DEFEND HIMSELF AND THE RECORD WILL SHOW ALSO THAT HE REFUSED TO TAKE HIMSELF OFF THE CASE TOO ONCE IT WAS CLEARLY POINTED OUT THAT HE WAS TOTALLY DERELICT IN HIS RESPONSIBILITIES.

As for the involvement of the second defendant, Mr. Gary Babcock, Oregon State Public Defender, he too was enlisted by those other state agents to make certain your plaintiff DID NOT GET THE CHANCE TO CONTEST THE ILLEGAL CONVICTION FORCED ON HIM BY THE TRIAL COURT.

Defendant Babcock was fully informed of the issues asserted by your Plaintiff in pro per at the trial court lever and additionally informed as to where these issues could be found in the trial court record. But, he refused to obtain the pertinent portions of the trial court record and prepared an opening brief which was incomplete, inadequate and in error. When your petitioner rejected this opening brief and asked defendant Babcock to update it and make it adequate and correct, Mr. Babcock refused. This was a deliberate and knowing and informed decision to deprive your plaintiff of a fair and adequate appeal so that your plaintiff would be deprived of his liberty for a long extended time without due process of law and so that your plaintiff would once again be thrust under the authority of and at the direct mercy of former prison officials who had caused your plaintiff's emotional and psychotic break leading to the criminal charges in Douglas County.

Since your Plaintiff was an indigent all these state officials felt free to enlist these two defendands (Tower and Babcock) to conspire with them to deprive your petitioner of his basic rights and his liberty so that those state officials who had previously proved themselves dishonest could once again have total power and control over your plaintiff. These state officials knew that if your plaintiff were allowed to defend himself their former dishonest actions would become public know-

ledge and could cause repurcussions.

This conspiracy went so far that when the case was finally heard by the Court of Appeals (BASED SOLELY ON THE TOTALLY INADEQUATE, INCOMPLETE AND ERRONEOUS OPENING BRIEF FILED BY THE DEFENDANT BABCOCK) Mr. Lee Johnson, former Attorney General for Oregon who mastermined the conspiracy set forth in your file # 80-6371-E placed himself on the court that "reviewed" plaintiff's appeal.

It should be pointed out that there is no way either defendant Tower or defendant Babcock can appear in court and defend their actions in this criminal case from Douglas County (File # 76-0386). Once the trial record is read and the communications to and from defendant Babcock concerning the appeal are reviewed then the conspiracy becomes evident. They both KNOWINGLY and deliberately deprived your plaintiff of his basic civil rights to defend himself against serious criminal charges knowing that no state court would call them to task.

Therefore, your plaintiff's only redress is through civil action via a Title 42 U.S.C. 1983. Your plaintiff has already demonstrated that the state courts will not give him redress.

Again your plaintiff refers this Honorable Court to the sister case of 80-6371-E together with the attached Exhibit # 1 for proof of this conspiracy by state officials who used these <u>two named defendant state officials</u> (Bruce Tower and Gary Babcock) to execute their conspiracy against this plaintiff.

Billy Erl Glover

Billy Erl Glover, Plaintiff
(Under Penalty of Perjury)

Certified A True Copy
THE ORIGINAL

Office - Supreme Court, U.S.
FILED
NOV 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1988

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender
of Douglas County, Oregon, and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioner,

v.

BILLY IRL GLOVER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*JAMES E. MOUNTAIN, JR.
Solicitor General
100 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

RICHARD SLOTTEE
Northwestern Legal Clinic
1018 Board of Trade Building
310 S.W. Fourth Avenue
Portland, Oregon 97204
Phone: (503) 222-6429
Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 31, 1983
CERTIORARI GRANTED OCTOBER 3, 1983

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 12, 1980—Glover files Complaint in the United States District Court for the District of Oregon against Bruce Tower, Public Defender of Douglas County, Oregon, and Gary Babcock, Public Defender of the State of Oregon for punitive damages under 42 U.S.C. § 1983. Glover's Complaint alleges that defendants Tower and Babcock conspired with state officials acting under color of state authority to deprive him of his civil rights.

Jan. 28, 1981—Motion to Dismiss filed in the United States District Court for the District of Oregon.

Feb. 13, 1981—Glover files Traverse to defendants' Motion to Dismiss along with a supporting Affidavit.

Mar. 3, 1981—Glover files Memorandum to the court in support of Traverse.

Apr. 1. 1981—Order of United States District Court entered granting defendants' Motion to Dismiss and dismissing action.

Apr. 3, 1981—Judgment of United States District Court entered dismissing action.

Apr. 4, 1981—Glover files Notice of Appeal in the United States Court of Appeals for the Ninth Circuit.

Mar. 1, 1983—Opinion of the United States Court of Appeals for the Ninth Circuit filed.

May 31, 1983—Tower and Babcock's Petition for Writ of Certiorari filed and docketed.

Oct. 3, 1983—Certiorari granted.

PLAINTIFF'S COMPLAINT

[Filed December 12, 1980]

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

In the United States District Court
For the District of Oregon

BILLY IRL GLOVER, Plaintiff
[Enter above the full name of the plaintiff in this action.]

COMPLAINT

v.

Civil No. 80-6720-E

BRUCE TOWER
Douglas County Public Defender
GARY BABCOCK,
Oregon State Public Defender
Defendants
[Enter above the full name of the defendant or defendants in this action]

ACTION UNDER TITLE 42 U.S.C. 1983, 1981, 1982 & 1985 (3) & related statutes governing CONSPIRACY BY STATE OFFICIALS ACTING UNDER COLOR OF STATE AUTHORITY TO DEPRIVE PLAINTIFF OF HIS CIVIL RIGHTS AS OUTLINED HEREIN.

I. Previous lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?
Yes [ ] No [X]

BUT THERE IS A RELATED CASE PRESENTLY BEING LITIGATED (Your File # 80-6371-E)

B. If your answer to A is yes, describe the lawsuit in the space below. [If there is more than one lawsuit describe the additional lawsuits on another piece of paper, using the same outline.]

1. Parties to this previous lawsuit

Plaintiffs N/A

Defendants N/A

2. Court [if federal court, name the district; if state court, name the county]

N/A

3. Docket Number N/A

4. Name of judge to whom case was assigned N/A

5. Dispostion [for example: Was the case dismissed? Was it appealed? Is it still pending?]

N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition N/A

II. Place of Present Confinement OREGON STATE PENITENTIARY

A. Is there a prisoner grievance procedure in this institution?

Yes [XX] No [ ]

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?
Yes [ ] No [XX]

C. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

D. If your answer is NO, explain why not This is NOT a prisoner grievance type suit but a suit against other officials acting under state authority.

E. If there is no prison grievance in the institution, did you complain to prison authorities? N/A

F. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

III. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of Plaintiff BILLY IRL GLOVER

Address Box 42831, 2605 State Street, Salem, Oregon 97310

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant BRUCE TOWER is employed as COUNTY PUBLIC DEFENDER at DOUGLAS COUNTY CIRCUIT COURT % COURTHOUSE, ROSEBERG [sic], OREGON

C. Additional Defendants GARY BABCOCK who is employed as the Oregon State Public Defender, 1655 State Street, Salem, Oregon 97310

IV. Statement of Claim

[State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If

you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

Bruce Tower, acting as a representative of the State of Oregon in the capacity of the Douglas County Public Defender conspired with other state officials - - including the trial court judges of Charles Woodrich and Robert Stults, who are unnamed defendants in this action since judges are immune from damages even though done with malice and forethought - - to deprive your plaintiff of his liberty by refusing to discharge his responsibilities and obligations as court appointed counsel for your plaintiff in the Douglas County Circuit Court case No. 76-0386. (SEE ADDITIONAL INFORMATION IN THE ATTACHED SUPPLEMENT TITLED "IV Statement of Claim."

V. Relief

[*State briefly exactly what you want the court to do for you.* Make no legal arguments. Cite no cases or statutes.]

From defendant Bruce Tower plaintiff asks the court to award punative [sic] damages in the amount of $5 million.

"From defendant Gary Babcock plaintiff asks the court to award punative [sic] damages in the amount of $5 million.

Signed this 30th date of October , 1980.

[Signature omitted in printing.]

I declare under penalty of perjury that the foregoing is true and correct.

[Signature omitted in printing.]

IV). Statement of Claim (Contd. from page 3 [5])

This is more than a mal-practice situation by defendant Bruce Tower as he conspired with and acted in unison with other state officials to *prevent* your plaintiff from mustering, preserving and presenting his defense in a criminal case in Douglas County (Circuit Court No. 76-0386).

In the criminal case referred to the defense proffered was THE AFFIRMATIVE DEFENSE OF MENTAL DEFECT OR DISEASE WHICH DIMINISHED OR NEGATED CRIMINAL RESPONSIBILITY.

There was ample evidence of the validity of this defense available to defendant Bruce Tower. During the entire six months defendant Tower had to prepare for the trial in the Circuit Court for Douglas County your plaintiff insisted on and pleaded with defendant Tower to search out and investigate the defense and to secure evidence that was needed; contact witnesses pertinent to the case; secure past psychiatric reports; and to otherwise research and prepare the defense.

However, state agents pursuaded defendant Tower to do nothing to prepare for the defense so that there would be a guaranteed conviction of your plaintiff. These same state agents persuaded the trial court judges of Charles Woodrich and Robert Stults to ignore your plaintiff's every request for

redress in the Douglas County Circuit Court so that these serious Constitutional errors could be corrected and your plaintiff could defend himself against those charges.

The reason these other state agents got involved in this criminal case was because your plaintiff needed certain documents from those state agents and their agencies (COMPARE FILE # 80 - 6371-E for the background setting for this case).

For the background information as to the manner in which defendant Tower carried out this conspiracy to deprive your plaintiff of his basic rights to defend himself, the Court is referred to exhibit # 1 attached which gives a rather thorough account of how this conspiracy was carried out.

Once the attached exhibit # 1 is studied it becomes evident that defendant Tower NEVER INTENDED TO ALLOW YOUR PLAINTIFF TO DEFEND HIMSELF AND THE RECORD WILL SHOW ALSO THAT HE REFUSED TO TAKE HIMSELF OFF THE CASE TOO ONCE IT WAS CLEARLY POINTED OUT THAT HE WAS TOTALLY DERELICT IN HIS RESPONSIBILITIES.

As for the involvement of the second defendant, Mr. Gary Babcock, Oregon State Public Defender, he too was enlisted by those other state agents to make certain your plaintiff DID NOT GET THE CHANCE

TO CONTEST THE ILLEGAL CONVICTION FORCED ON HIM BY THE TRIAL COURT.

Defendant Babcock was fully informed of the issues asserted by your plaintiff in pro per at the trial court lever [sic] and additionally informed as to where these issues could be found in the trial court record. But, he refused to obtain the pertinent portions of the trial court record and prepared an opening brief which was incomplete, inadequate and in error. When your petitioner rejected this opening brief and asked defendant Babcock to update it and make it adequate and correct, Mr. Babcock refused. This was a *deliberate* and knowing and informed decision to deprive your plaintiff of a fair and adequate appeal so that your plaintiff would be deprived of his liberty for a long extended time without due process of law and so that your plaintiff would once again be thrust under the authority of and at the direct mercy of former prison officials who had caused your plaintiff's emotional and psychotic break leading to the criminal charges in Douglas County.

Since your Plaintiff was an indigent all these state officials felt free to enlist these two defendands [sic] (Tower and Babcock) to conspire with them to deprive your petitioner of his basic rights and his liberty so that those state officials who had previously proved themselves dishonest could once

again have total power and control over your plaintiff. These state officials *knew* that if your plaintiff were allowed to defend himself their former dishonest actions would become public knowledge and could cause repurcussions [sic].

This conspiracy went so far that when the case was finally heard by the Court of Appeals (BASED SOLELY ON THE TOTALLY INADEQUATE, INCOMPLETE AND ERRONEOUS OPENING BRIEF FILED BY THE DEFENDANT BABCOCK) Mr. Lee Johnson, former Attorney General for Oregon who mastermined [sic] the conspiracy set forth in your file # 80-6371-E placed himself on the Court that "reviewed" plaintiff's appeal.

It should be pointed out that there is no way either defendant Tower or defendant Babcock can appear in court and defend their actions in this criminal case from Douglas County (File # 76-0386). Once the trial record is read and the communications to and from defendant Babcock concerning the appeal are reviewed then the conspiracy becomes evident. They both KNOWINGLY and deliberately deprived your plaintiff of his basic civil rights to defend himself against serious criminal charges knowing that no state court would call them to task.

Therefore, your plaintiff's only redress is through civil action via a Title 42 U.S.C. 1983. Your plain-

tiff has already demonstrated that the state courts will not give him redress.

Again your plaintiff refers this Honorable Court to the sister case of 80-6371-E together with the attached Exhibit # 1 for proof of this conspiracy by state officials who used these *two named defendant state officials* (Bruce Tower and Gary Babcock) to execute their conspiracy against this plaintiff.

[Signature omitted in printing.]

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

[Filed January 28, 1981]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title omitted in printing.]

Come now defendants, Bruce Tower and Gary Babcock, by and through their attorney, Lisa Brown, and move the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the cause of action against them for the reason that the Complaint fails to state a claim upon which relief can be granted.

This motion is supported by the Memorandum of Points and Authorities attached hereto.

[Signature omitted in printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

[Title omitted in printing.]

Plaintiff alleges that defendants Bruce Tower, Douglas County Public Defender, and Gary Babcock, State Public Defender, conspired with other state officials "to deprive him of his liberty" by refusing to discharge their responsibilities and obligations as court appointed trial and appellate counsel. He

brings suit under 42 USC §§ 1981, 1982, 1983 and 1985, and requests punitive damages in the amount of $5 million from each defendant.

A) *42 USC § 1983.*

The Ninth Circuit Court of Appeals held in *Miller v. Barilla*, 549 F2d 648 (9th Cir 1977), "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in the performance of his judicial function as a public defender." *Miller, supra* at 649. The court reasoned in *Miller* that "the public defender acts in the same manner representing his client as does the prosecutor in representing the state and should be accorded similar immunity from acts arising out of that function." The court cited *Brown v. Joseph*, 463 F2d 1046 (3d Cir 1972), *cert denied*, 93 S Ct 3015, 37 L Ed2d 1003 (1973), where the court stated:

> "We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders." 463 F2d at 1048.

The policy reasons supporting absolute immunity are discussed in *Minns v. Paul*, 542 F2d 899 (4th Cir 1976), and relied on by the Ninth Circuit in *Miller, supra* at 649. In *Minns*, the court identified the policy reasons supporting absolute immunity for public defenders:

> "(a) the need to recruit and hold able lawyers to represent indigents . . ., and (b) the need to encourage counsel in the full exercise of profes-

> sionalism, i.e., the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." 542 F2d at 901.

Although the case law is inconsistent among the circuit courts, there seems to be agreement that a public defender is entitled to some degree of immunity, either absolute or qualified. The Eighth Circuit recently held that a public defender is entitled to qualified immunity and could not be subject to suit under § 1983 unless he

> " . . . acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with the malicious intention to injure his client. The touchstone is good faith."[1]

As public defenders have been held by the Ninth Circuit to be immune from liability in § 1983 actions, plaintiff fails to state a claim upon which relief can be granted, and his Complaint should be dismissed.

B) *42 USC §§ 1981 and 1982*

Plaintiff fails to state a claim under 42 USC § 1981 in that he fails to allege any deprivation of

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[1]The Eighth Circuit rejects the extension of absolute immunity to public defenders due to the Supreme Court's holding in *Terri [sic] v. Ackerman*, 444 US 193, 100 S Ct 402, 62 L Ed2d 355 (1979), which was a state malpractice action where it was held that an attorney appointed by a federal court to represent an indigent defendant is not entitled to absolute immunity as a matter of federal law.

equal rights under the law based on race, sex, religion or any other bases of discrimination.

Plaintiff fails to state a claim under 42 USC § 1982 in that he fails to allege any deprivation of property rights.

C) *48 [sic] USC § 1985(3)*

Plaintiff fails to state a claim for relief under 42 USC § 1985(3) which provides for civil liability upon a conspiracy to interfere with civil rights. In order to state a cause of action under § 1985(3),

> "it must be asserted that the defendants conspired to deprive a plaintiff . . . of equal protection of the laws, thereby causing injury to him or his property. *Griffin v. Breckenridge*, 403 US 88, 102-103, 91 S Ct 1790, 29 L Ed2d 338 (1971); *Lopez v. Arrowhead Ranches*, 523 F2d 924, 926-28 (9th Cir 1975); *Arnold v. Tiffany*, 487 F2d 216, 217-19 (9th Cir 1973), *cert denied*, 415 US 984, 94 S Ct 1578, 39 L Ed2d 881 (1974)." *Briley v. State of California*, 564 F2d 849 (9th Cir 1977).

In *Griffin*, the Supreme Court made it clear that § 1985 only applied to conspiratorial interferences with the rights of others which were founded upon "some racial or perhaps otherwise class-based, invidiously discriminatory animus." 403 US at 101-02, 91 S Ct at 1798.

As plaintiff fails to allege that either of the public defenders' actions were motivated by racial or any other invidiously discriminatory animus, his Complaint fails to state a claim under § 1985(3) and should be dismissed.

For the foregoing reasons, defendants respectfully request an order dismissing plaintiff's Complaint and denying plaintiff's requested relief on the ground that plaintiff fails to state a claim upon which relief can be granted.

[Signature and certification omitted in printing.]

TRAVERSE TO DEFENDANTS' MOTION TO DISMISS AND ANSWER TO COMPLAINT

[Filed February 13, 1981]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Title of case omitted in printing]

Comes now Plaintiff and traverses the Answer given by the defendants in the above titled case and shows why the action cannot be dismissed as a matter of law.

First, on or about January 30, 1981 Plaintiff received an answer from an attorney purportedly representing defendant Bruce Tower. The attorney's name is Robert E. Franz, Jr. located at 767 Willamette Street, Suite 304, Eugene, Oregon 97401. Subsequently Mr. Franz has notified Plaintiff that in fact he is not representing defendant Tower but that the Oregon State Attorney General's Office is representing both defendants Tower and Babcock. Therefore, Plaintiff is proceeding on this presumption that the Oregon State Attorney General's Office is acting as defense counsel for both defendants.

In the answer and motion for dismissal, defense counsel Lisa Brown, Assistance [sic] Attorney General for the state of Oregon, asked for dismissal claiming that the 9th Circuit Court's postion in Miller v. Barilla, 549 F 2d 648, (1977) should

prevail. The 9th Circuit held "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in the performance of his judicial function as a public defender." Miller, supra, at 649.

Obviously defense counsel did not read the claim set forth in this action. The claim set forth was *NOT concerning the performance of judicial function as a public defender.* The claim set forth was CONSPIRACY TO DEPRIVE THIS PLAINTIFF OF BASIC CIVIL AND CONSTITUTIONAL RIGHTS. In his claim of action this plaintiff did clearly state that this was *NOT* a "mal-practice" suit. What is involved here is far more serious that [sic] a mere mal-practice suit based on dereliction of official duty. Neither is this plaintiff claiming that the defendants were merely negligent and inadvertantly neglected or failed to perform some particular function.

WHAT IS SPECIFICALLY CHARGED IS AN OVERT ACT OF CONSPIRACY BETWEEN THE TWO DEFENDANTS AND OTHER STATE OFFICIALS TO DEPRIVE THIS PLAINTIFF OF HIS BASIC CIVIL AND CONSTITUTIONAL RIGHTS.

SINCE CONSPIRACY TO DEPRIVE A PERSON OF HIS BASIC CIVIL RIGHTS IS A FEDERAL CRIME AS WELL AS A VIOLATION OF FEDERAL STATUTES THEN IN NO WAY WOULD THE

DEFENDANTS BE IMMUNE FROM EITHER DAMAGES OR PROSECUTION SIMPLY BECAUSE THEY WERE EMPLOYED BY A PUBLIC DEFENDER AGENCY.

The United States Supreme Court in Mitchum v. Foster, 92 S.Ct. at 2162; 407 U.S. at 242 (Headnotes 13-15) said:

> "The very purpose of § 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights - - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or *JUDICIAL*.' (emphasis added). Ex parte Virginia 100 U.S., at 346; 25 L. Ed. 676"

In Headnote 11, the Supreme Court held that:

> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce provisions of the Fourteenth Amendment 'against State action, . . .whether that action be executive, legislative, or JUDICIAL.'" (emphasis added, at page 2161 of 92 S. Ct. (407 U.S. at 240).

As the Supreme Court further noted, at page 2161:

> "'If the State courts had proven themselves competent to suppress the local disorder, or to maintain law and order, we should not have been called upon to legislate. . . . We are driven by existing facts to provide for the several states. . .the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts.' Id. at 653. And Representative

> Perry concluded: 'Sheriffs, HAVING EYES TO SEE, SEE NOT: JUDGES, HAVING EARS TO HEAR, HEAR NOT; WITNESSES CONCEAL THE TRUTH OR FALSIFY IT; GRAND AND PETIT JURIES ACT AS IF THEY MIGHT BE ACCOMPLICES. . .ALL THE APPARATUS AND MACHINERY OF CIVIL GOVERNMENT, ALL THE PROCESSES OF JUSTICE SKULK AWAY AS IF GOVERNMENT AND JUSTICE WERE CRIMES AND FEARED DETECTION. AMONG THE MOST DANGEROUS THINGS AN INJURED PARTY CAN DO IS TO APPEAL TO JUSTICE.' Id., at App. 78." (emphasis added).

The purported purpose for the public defender system is to provide meaningful legal assistance for the indigent facing criminal charges. Counsel for the defendants is claiming that the defendants (and all attorneys employed in a public defender role) should be free to *conspire* with the state at will to deprive indigents of their basic rights by SELLING OUT THOSE INDIGENTS IN EXCHANGE FOR FAVORABLE ACTION FOR THOSE CHARGED WITH CRIMES WHO ARE ABLE TO BRIBE THEIR WAY OUT OF THE CHARGES. Defense counsel would have this court believe that such a conspiracy and "selling out" is to be regarded as a part of "the performance of his judicial function as a public defender." (Miller, supra,).

Such a position is totally untenable. Such a position would totally destroy the public defender system and the purpose for which it was created. Such a position would totally negate the Sixth

Amendment right to "assistance of counsel" since the public defender would not be functioning as an integral part of the advesary [sic] system *but* as:

> ". . .an organ of the state interposed between. . .(the). . .defendant and HIS RIGHT TO DEFEND HIMSELF. . . and the right to make a defense is stripped of the personal character upon which the Amendment INSISTS. . .UNLESS THE ACCUSED ACQUIESCED IN SUCH REPRESENTATION, the defense presented is NOT the defense GUARANTEED HIM BY THE CONSTITUTION, for in the very real sense, IT IS NOT HIS DEFENSE." (Faratta v. California, 95 S.Ct. 2533; 432 U.S. at 829 (June 1975). (Emphasis added by plaintiff).

Such a position as claimed by the counsel for the defendants would totally destroy the advesary [sic] system itself. If the court appointed attorney is not responsible for his actions and *liable for his conspiracies* then no one would be safe because the state could at any time deprive any indigent of his life, liberty and property by appointing to him counsel willing to sell the indigent's rights out to the state and its interests.

Such a position would additionally bring the court itself into reproach and disdain. Such a position would destroy the integrity of the BAR itself. Yet, one of the basic rules of the Bar is that "No practice must be permitted (such as granting absolute immunity to lawyers serving as public defenders who *conspire* with the state to deprive their

charges of basic civil and constitutional rights) which invites toward the ADMINISTRATION OF JUSTICE A DOUBT OR DISTRUST OF ITS INTEGRITY (citation)" (see page LXV of the February 24, 1970 ABA *Code of Professional Responsibility*, footnotes 12 (1) and (2). (emphasis added by plaintiff).

And, perhaps more important, such a position would establish the public defender system as a hoax, fraud and sham foisted upon the public and costing millions and millions of dollars annually to continue such a fraud. If the public defender is not *accountable for such conspiracies* with the state against his client then the indigent would be a lot better off without his services for without his services the indigent would merely be standing alone and naked against the trial judge and the prosecutor *rather than* standing alone and naked against the judge, the prosecution *and* the lawyer who allegedly was protecting his interests when in actuality he was a secret agent of the state.

Plaintiff points out that the circumstances and conditions of Miller, supra, were totally different from those which are evidenced in this case at bar. Miller's claim was that his trial judge, the assistant district attorney and a deputy public defender *misrepresented certain factors* to him thus inducing him to waive his rights to a jury trial and enter a

guilty plea in a plea bargain which was not respected. Since Miller's claimes [sic] primarily involved an alleged broken plea bargain, his redress was clearly through other means and not a § 1983 action claim.

However, in Miller, supra, the 9th Circuit cited Minns v. Paul, 542 F 2d 899 (4th Cir.) and stated that the reasoning of the 4th Circuit Court was persuasive. The Minns, supra, court reasoned that public defenders should be accorded immunity because:

> "Basically there are two (reasons): (a) the need to recruit and hold able lawyers to represent indigents - - both full and part-time public defenders, as well as private practicioners [sic] appointed by courts to represent individual defendants or litigants, and (b) the need to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion, in the light of their training and experience, to decline to press the frivilous, [sic] to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." (at page 901).

Plaintiff calls specific attention to the fact that both the Minns Court (4th Circuit) and the Miller Court (9th Circuit) and additionally the court of Brown v. Joseph, 463 F 2d 1046 (3rd Circuit) cited by the 9th and the 4th circuits in reaching their decisions, did not deal with or address the OVERT ACT OF CONSPIRACY. In ALL CASES THE COURTS STIPULATED OR HELD THEIR CONCLUSIONS WERE BASED ON "PUBLIC DEFEND-

ERS *ACTING WITHIN THE SCOPE OF THEIR DUTIES*. . ."

It cannot be said that when an attorney (public defender or not) CONSPIRES WITH OTHER COURT OR STATE OFFICIALS TO DEPRIVE AN INDIGENT OF HIS BASIC CIVIL AND CONSTITUTIONAL RIGHTS THAT HE IS "ACTING WITHIN THE SCOPE OF HIS DUTIES AS PUBLIC DEFENDER." Such is clearly *outside* his jurisdiction since it is a direct violation of both state and federal statutes. AS A MATTER OF LAW, THERE IS NO LEGAL BASIS FOR GRANTING SUCH AN ATTORNEY IMMUNITY FOR SUCH CLAIMS SINCE § 1983 IS THE SPECIFIC FEDERAL STATUTE LEGISLATED TO REDRESS SUCH CIVIL VIOLATIONS.

Again Plaintiff calls attention to the wording of the United States Supreme Court in Mitchum, suprs, [sic] "WHETHER THAT ACTION BE EXECUTIVE, LEGISLATIVE, OR *JUDICIAL*." (emphasis added). Even if public defenders did enjoy absolute immunity WHEN SPECIFICALLY PERFORMING THEIR OFFICIALS [sic] DUTIES, (and the 8th Circuit just recently held that they are not so immune - - as will be seen later in this brief), THEIR ALLEGED IMMUNITY WOULD CEASE THE MOMENT THEY ENGAGED IN AN OVERT ACT OF CONSPIRACT [sic] - - WHICH WOULD BE CONDUCT,

BEHAVIOR AND ACTIONS OUTSIDE THEIR OFFICIAL CAPACITY AND RESPONSIBILITY.

The reasoning of the 9th Circuit, the 4th Circuit and the 3rd Circuit courts that holding public defenders liable would discourage able personnel from entering the profession will not withstand objective scrutiny. For example, police officers are professionals who are liable for their conduct in § 1983 actions and yet this fact does NOT DISUADE COMPETENT PERSONNEL FROM ENTERING THE PROFESSION OF POLICE WORK. Neither does it discourage PROFESSIONALISM among police officers. Rather, it stimulates and mandates the opposite because police officers know that if they abuse their office as officers of the law they can and perhaps will be held liable for damages incurred.

The same reasoning is true with all professions. Quality professionals are not discouraged from entering the medical profession, or any other profession in which a § 1983 action would hold, because they can be held liable for their actions. Such liability IMPROVES THE QUALITY OF THE PROFESSIONAL CONDUCT. It cannot be logically argued that holding lawyers liable for their actions would diminish the quality of performance.

This is clearly borne out by the decisions of the Supreme Court in Ferri v. Ackerman, 100 S. Ct. at

409 (1979- - two years after the 9th Circuit's decision in Miller, supra).

> "The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim DOES NOT CONFLICT WITH PERFORMANCE OF THAT FUNCTION. *If anything*, IT PROVIDES THE SAME INCENTIVE FOR APPOINTED AND RETAINED COUNSEL *TO PERFORM THAT FUNCTION COMPETENTLY.* THE PRIMARY RATIONALE FOR GRANTING IMMUNITY TO JUDGES, PROSECUTORS, AND OTHER PUBLIC OFFICIALS DOES *NOT* APPLY TO DEFENSE COUNSEL SUED FOR MALPRACTICE BY HIS OWN CLIENT.
>
> "(8,9) It may well be, as respondent urges, that valid policy reasons might justify an immunity for appointed counsel that need not be accorded to privately retained counsel. See n. 17, supra. Perhaps the most persuasive reason for creating such an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants. If their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disproportionately significant, it is conceivable that an immunity would be justified by the need to preserve the supply of lawyers available for this important. Whether a significant need can be demonstrated that would justify such a rule (1/), or whether such a problem might be better remedied by adjusting the level of compensation, are questions that can most appropriately be answered by a legislative body acting on the basis

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1/ This showing that the Supreme Court is well aware of the 9th Circuit's position in Miller, supra.

> of empiracal [sic] data. THEREFORE WE DO NOT EVALUATE THESE ARGUMENTS. Having CONCLUDED that the essential OFFICE OF APPOINTED DEFENSE COUNSEL IS AKIN TO THAT OF PRIVATE COUNSEL(2/) AND *UNLIKE THAT OF A PROSECUTOR, JUDGE, OR NAVAL CAPTAIN*, WE CONCLUDE (that the federal immunity clause). . .is simply inapplicable in this case. Accordingly, without reaching any question concerning the power of Congress to create immunity, we hold that federal law does NOT NOW PROVIDE IMMUNITY FOR COURT APPOINTED COUNSEL IN A STATE MALPRACTICE SUIT BROUGHT BY HIS FORMER CLIENT." (emphasis added).

Additionally, the Supreme Court had already held earlier in Ferri, supra, at Headnotes 6 and 7, that:

> "In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization in furtherance of the federal interests in *insuring effective representation* of criminal defendants, his duty IS NOT TO THE PUBLIC AT LARGE, except in that general way. HIS PRINCIPAL RESPONSIBILITY IS TO SERVE THE UNDIVIDED INTERESTS (3) OF HIS CLIENT. Indeed, an indispensible [sic] element of the effective performance of his responsibilities is the ability to act independently on the government and to oppose it in advesary [sic] litigation." (at page 409).

2/ Clearly showing that the Supreme Court does NOT concede that the position of defense counsel (public defender) is granted the same immunity as is accorded judges, prosecutors and certain other officials.

3/ The Supreme Court would most assurdly frown on conspiracy by a lawyer.

Using the principles set forth by the United States Supreme Court in its decision in Ferri, supra, the 8th Circuit Court set forth the following in what is logically the correct principle in this matter. The Court held:[4/]

> "The district court held that defendant Walsh, as a court-appointed defense counsel, enjoyed an absolute immunity akin to that enjoyed by a judge or prosecutor. This position, although it HAD BEEN ADOPTED by at least four circuits, is NO LONGER TENABLE AFTER THE RECENT DECISION OF FERRI V. ACKERMAN,. . .the Ferri Court reasoned that while the prospect of personal litigation would impede the performance of the function of prosecutor and judge, the prospect of a malpractice suit by a criminal defendant would not conflict with the competent performance of the function of criminal defense counsel. Id. 100 S. Ct. at 409. An important reason supporting common law immunity for porsecutors [sic] and judges therefore does *not support a like immunity for court-appointed attorneys.* Although Ferri involved a state malpractice action, ITS LOGIC EXTENDS TO SECTION 1983 CLAIMS; ITS BROAD HOLDING IS THAT A FEDERAL COMMON LAW IMMUNITY AVAILABLE TO PROSECUTORS AND JUDGES, Imbler v. Pachtmen, supra, 424 U.S. 409; 96 S. Ct. 984; 47 L. Ed. 2d 128; Pierson v. Ray, 386 U.S. 547; 87 S. Ct. 1213; 18 L. Ed. 2d 288 (1967) IS NOT AVAILABLE TO

4/ In White v. Bloom, 621 F 2d at 280, Headnote # 8

COURT-APPOINTED ATTORNEYS." (emphasis added).

In a footnote the 8th Circuit stated: "The Court determined that although immunity for court-appointed defense counsel might still be justified by the need to induce attorneys to represent indigent criminal defendants, that justification IS DIRECTED AT CONGRESS,[5/] NOT THE COURTS. 100 S.Ct. at 409 - 10.

In Lopez v. Vanderwater, 620 F 2d 1229, the 7th Circuit Court held that even a judge is not immune WHEN HE ACTS IN EXCESS OR OUTSIDE HIS SPECIFIC JUDICIAL CAPACITY.[6/] How much more so then would an attorney be liable for acts of conspiracy which could not be claimed as a part of his official duties and responsibilities! The court-appointed attorney is obligated to protect the rights and interests of his indigent client (AS NOTED BY THE SUPREME COURT) NOT SELL HIM OUT TO THE STATE AND ITS OFFICIALS.

Since the court-appointed attorney is paid for by the state, then certainly he can and legally is an

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5/ Since Congress has not granted public defenders such immunity then obviously they do not enjoy immunity.

6/There is certainly no legal basis for an attorney (court appointed or not) to claim that he is immune from damages resulting from conspiracy to deprive his indigent client of his basic civil and constitutional rights.

agent of the state (Cf. Lopex [sic] v. Vanderwater,[7/] supra, with Faretta v. California,[8/] supra.

In United States v. Havens, 100 S. Ct. at 1916 and 1920, the Supreme Court stated:

> ""There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.""
>
> "At any rate, what is important is that the Constitution does not countenance police (or attorney) misbehavior, even in the pursuit of truth. The processes of our judical system MAY NOT BE FUELED BY ILLEGALITIES OF GOVERNMENT AUTHORITIES (citation)" (emphasis added).
>
> ". . .by treating Fourth and Fifth (as well as Sixth) Amendment privileges as mere incentive schemes, the Court denigrates their unique status AS CONSTITUTIONAL PROTECTORS. Yet the efficacy of the Bill of Rights as bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional proscriptions. The Court is charged with the responsibility to ENFORCE CONSTITUTIONAL GUARANTEES. . ." (emphasis added).

In Gomez v. Toledo, 100 S.Ct. at 1924, the Supreme Court, in commenting on qualified or limited immunity, said that:

> ". . .whether such immunity has been established depends on facts particularly within the knowledge and control of the defendant."

In the instant case, the two defendants had the clear choice to forego participating in the conspiracy.

7/ At Headnote 9, page 1236 (620 F2d).

8/ 422 U.S. at 829.

In fact, in the ANSWER, it is noted by plaintiff that the defendants DID NOT DENY THE EXISTANCE [sic] OF THE CONSPIRACY OR THE DEPRIVATION OF BASIC CONSTITUTIONAL AND CIVIL RIGHTS. They merely claimed that they should be allowed to engage in such because they should not be held accountible [sic] or liable for such actions. Yet, at the trial of this suit the plaintiff will show clearly that he repeatedly advised both defendants that they would be held both liable and responsible for those actions evident in this case. Repeatedly the plaintiff advised both defendants that they should either begin to fulfill their official obligations or withdraw from the case - - as is clearly set forth in the ABA Codes [sic] of Professional Responsibility. Since neither defendant withdrew from the case, then both are liable for the damages incurred by the plaintiff.

The Code of Professional Responsibility makes it clear that when an attorney discovers such conspiracy and/or malfeassance, [sic] he has the obligation to either get it straightened out or to withdraw from the case. Since the defendants did not withdraw from the case once they were formally advised by the plaintiff that they would be held liable then it is evident they voluntarily and knowingly participated in the conspiracy and the resultant civil violations and that their willing and knowing actions RE-

QUIRE THAT THEY BE HELD TO ANSWER IN THE APPROPRIATE FEDERAL COURT - - pursuant to the haldings [sic] of the United States Supreme Court.

Since neither defendant denied the existance [sic] of the conspiracy; did not deny that plaintiff's basic rights were violated; did not deny that plaintiff gave them ample opportunity to withdraw and warned thet [sic] that they would be held liable; neither attempted to defend themselves at the time against plaintiff's accusations; and neither sought to be relieved but willingly participated, then obviously they must be held to answer for their actions in this conspiracy.

Again, plaintiff points out that this is *not* a "malpractice" suit but a civil claim that the defendants knowingly participated in a conspiracy to deprive him of his basic rights guaranteed by the Constitution of the United States of America and redressed in the United States District Court under 42 U.S.C. 1983.

Plaintiff prays this Honorable Court to set a time for trial of this law suit at the earliest opportunity.

[Signature and certification omitted in printing.]

File #80-6720-E

AFFIDAVIT

February 13, 1981

This is to state, under penalty of perjury, that I, Billy Irl Glover, am the plaintiff in the herein named case at bar.

That this case is inseparably connected with case number Civil 80-6371-E which is also currently before this Honorable Court. That case number 80-6371 sets forth the background for the conspiracy and some of the state officials involved and the reason they believed it expedient to join forces to deprive plaintiff of his basic rights so as to assure a conviction and committment [sic] to the Oregon State Penitentiary as a political move to try and control plaintiff and prevent him from revealing what he knows about the illegal practices of those officials - - acting under color of state authority to obstruct justice, cover embezzlement and otherwise misuse and abuse the power and authority of their offices to the hurt and injury of other people and to the hurt and injury of the peace and dignity of the state of Oregon as well as this plaintiff.

This is also to state that there was an ongoing conspiracy evident at the time that defendants Tower and Babcock came into contact with this plaintiff through their appointment as public defenders in his criminal proceedings. That both defendants were advised by plaintiff that they

should either fulfill their legal and moral obligations or immediately withdraw from the case. Despite the fact that both defendants were repeatedly told they would be held liable and accountable, they still refused to discharge their official duties toward this plaintiff and furthered this conspiracy. As a result of this conspiracy this plaintiff suffered an illegally obtained felony conviction and imprisonment which prevented plaintiff from obtaining the psychiatric assistance he needed. This not only caused further mental and emotional difficulties to the plaintiff but also to his family.

Both defendants joined this conspiracy with the specific motive and intent to prevent plaintiff from receiveing [sic] his constitutional right to proper assistance from counsel and his basic rights to proper medical and psychiatric assistance when material readily available to both defendants clearly showed that this plaintiff was suffering from a mental and emotional disease or defect. There were several psychiatric reports available which specifically stated that this plaintiff WAS MENTALLY ILL. Rather than helping this plaintiff gain the proper assistance he is entitled to by law, they chose to join the conspiracy which would make it impossible to the plaintiff to receive this help.

One of the psychiatric reports readily available to both of these defendants predicted that this plaintiff

would suffer another psychotic break and that he was comparable to "A POWDER KEY [sic] READY TO EXPLODE!" Yet, these defendants did nothing to assure that this plaintiff received the psychiatric help that he needed or to see that (as much as was possible) he did not "explode" and possibly cause harm to himself or to others.

Plaintiff suffered mental and emotional stress and suffering as a direct results [sic] of these basic civil and constitutional rights. Rather than getting the psychiatric help he needed, plaintiff had to live daily with the fear of being again thrust under the direct power and control of the same state officials who initially caused his second psychotic break.

Plaintiff also suffered a traumatic shock in being forced to recognize that the public defender system in Oregon is directly tied in with the other state officials and do not hesitate to conspire with those state officials at will to the hurt and injury of those who are unable to protect themselves.

[Signature omitted in printing.]

PLAINTIFF'S MEMORANDUM TO THE COURT IN SUPPORT OF TRAVERSE

[Filed March 3, 1981]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Title omitted in printing.]

The records in the above titled case show that plaintiff has traversed the defendants' ANSWER and motion to dismiss on the basis that a public defender is granted immunity for a 1983 action.

The attached exhibit is a newspaper clipping from the March 3, 1981 issue of the Salem, Oregon Statesman/Journal newspaper in which the news of the United States Supreme Court is listed. [Newspaper clipping exhibit omitted.] Note that the Supreme Court has agreed to decide the issue of whether a public defender can be sued for violating civil rights of indigent clients.

Therefore, as plaintiff pointed out, this action cannot be dismissed as a matter of law until such time as the issue involved has been resolved in the United States Supreme Court.

Plaintiff will be preparing documents seeking to get his case attached to the case going up before the Supreme Court as he believes that he has presented the basic arguments which will hold before that court.

[Signature omitted in printing.]

UNITED STATES DISTRICT COURT ORDER

[Filed April 1, 1981]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title of case omitted in printing.]

Billy Irl Glover, plaintiff, brings this civil rights action pursuant to 42 U.S.C. 1981, 1982, 1983 and 1985(3), alleging that his public defenders at trial and on appeal inadequately represented him, and conspired with the trial judge and other unnamed officials to secure his conviction of a felony. Plaintiff is presently incarcerated in the Oregon State Penitentiary.

Defendants deny that plaintiff has stated a claim for relief, and move for dismissal.

Plaintiff has not stated a claim under 42 U.S.C. § 1981 or 1982 because he has not alleged a racially-motivated deprivation of rights or property. *Des Vergnes* v. *Seekonk Water District*, 601 F.2d 9 (1st Cir. 1979); *Jones* v. *Mayer*, 392 U.S. 409 (1968).

Plaintiff has not stated a claim under 42 U.S.C. § 1985(3) because he has not alleged that the conspiracy was founded upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971).

Finally, plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function. *Miller* v. *Barilla*, 549 F.2d 648 (9th Cir. 1977); *Housand* v. *Heiman*, 594 F.2d 923 (2nd Cir. 1979).

Plaintiff contends that defendants were acting outside the scope of their immunity when they conspired to secure his conviction. As evidence of this conspiracy, he claims that defendants failed to obtain certain evidence and witnesses to support his defense of mental defect or disease, and refused to withdraw as counsel, in order to allow plaintiff to represent himself. Plaintiff further alleges that the trial judge aided in the conspiracy by refusing to grant his motions for appointment of new counsel and for a new trial. The appellate court allegedly participated in the conspiracy by accepting defendant Babcock's brief, and by refusing to allow plaintiff to represent himself.

Plaintiff's claim fails to allege any actions by defendants which lie outside the scope of their judicial function. For purposes of 42 U.S.C. § 1983, public defenders have "unfettered discretion" in their decisions regarding the introduction of evidence, the presentation of witnesses, and the submission of motions.[1] Therefore, plaintiff's allegations do not strip defendants of their absolute immunity.

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[1] *Miller* v. *Barilla*, 549 F.2d at 649; *Housand* v. *Heiman*, 594 F.2d at 924-925.

Defendants' motion to dismiss is granted and this proceeding is dismissed. The Clerk is directed to enter judgment accordingly.

DATED this 1st day of April, 1981.

[Signature of Judge Robert C. Belloni
omitted in printing.]

UNITED STATES DISTRICT COURT
JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed April 3, 1981]

BILLY IRL GLOVER,	)	
	)	
Plaintiff,	)	Civil No. 80-6720-E
	)	
	)	JUDGMENT
v.	)	
	)	
BRUCE TOWER etc. et al	)	
	)	
Defendant.	)	

This action is dismissed.

Dated: April 3, 1981.

[Signature omitted in printing.]

NOTICE OF APPEAL

[Filed April 7, 1981]

IN THE UNITED STATES DISTRICT COURT
DISTRICT FOR OREGON

[Title omitted in printing.]

Comes now your plaintiff and serves notice of appeal of the order issued by judge Robert Balloni [sic] dated April 3, 1981.

See the attached Petition for a Certificate of Probable Cause for the basis for this appeal.

[Signature and certification omitted in printing.]

UNITED STATES DISTRICT COURT OPINION

[Filed March 1, 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILLY IRL GLOVER,	)	
Plaintiff-Appellant,	)	
	)	CA No. 81-3199
vs.	)	DC No. CV 80-6720
BRUCE TOWER, Public Defender of Douglas County, Oregon and GARY BABCOCK, Public Defender of the State of Oregon,	)	OPINION
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni,
District Judge, Presiding

Argued and Submitted December 7, 1982

Before: GOODWIN, PREGERSON and CANBY, Circuit Judges

CANBY, Circuit Judge:

Glover appeals the district court's dismissal of his civil rights action. The complaint, which was filed by Glover pro se, alleged that the public defenders

who represented him in a prior state criminal action violated the provisions of 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) by conspiring with various public officials to violate his constitutional rights. The district court held that Glover had failed to state a claim upon which relief could be granted and dismissed his action.

Glover alleged that his public defenders at trial and on appeal violated his constitutional rights by conspiring with the trial judge, the Oregon Court of Appeals and other named and unnamed state officials to secure his conviction on a felony charge brought by the State of Oregon. He alleged that defendant Tower intentionally failed to obtain evidence to support his defense of mental defect and refused to withdraw as counsel to allow Glover to represent himself. He further alleged the existence of a conspiracy between Tower and the trial judge to secure his conviction. In furtherance of that conspiracy, the trial judge allegedly denied Glover's motions for new counsel and for a new trial. The Oregon Court of Appeals is alleged to have participated in the conspiracy by accepting defendant Babcock's appellate brief over Glover's objections and by refusing to allow Glover to represent himself during the appeal.

Glover also alleged that Babcock, as public defender administrator, appointed himself to repre-

sent Glover on appeal to insure that his conviction would be upheld. Similarly, he alleged that Judge Lee Johnson had himself placed on the panel which was to hear Glover's appeal to insure that his conviction would be affirmed. Judge Johnson had been attorney general at the time of Glover's trial and was named to the Oregon Court of Appeals during the interim.

The district court held that Glover had failed to allege anything in the nature of racial discrimination, necessary for section 1981 and 1982 claims, or the type of class-based discrimination necessary for a section 1985(3) claim. No extended discussion of these holdings is required. The district court was correct and that portion of its judgment is affirmed. *See London v. Coopers & Lybrand*, 644 F.2d 811, 818 n.4 (9th Cir. 1981); *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Glover's contention on appeal that he was treated less favorably as an indigent than he would have been had he been affluent enough to retain his own lawyer does not, in our view, make out a proper class-based 1985(3) claim.

The district court also held that Glover's remaining claim under section 1983 failed to state a cause of action because public defenders are absolutely immune from suit under section 1983. That portion of the court's ruling was error and we reverse.

In *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977), this court adopted the rationale of *Minns v. Paul*, 542 F.2d 899 (4th Cir.), *cert. denied*, 429 U.S. 1102 (1976), and announced a rule of absolute immunity for public defenders under section 1983. We reasoned that absolute immunity would encourage able lawyers to represent indigents and encourage counsel in "the full exercise of professionalism . . . ." *Miller v. Barilla*, 549 F.2d at 649 (*quoting Minns v. Paul*, 542 F.2d at 901). We concluded that there was no valid reason to treat public defenders differently from prosecutors and judges in this regard.

The district court understandably felt itself bound by *Miller*.[1] Our review of a subsequent Supreme Court case, *Ferri v. Ackerman*, 444 U.S. 193 (1979), has convinced us that *Miller* is no longer good law. In *Ferri*, the Court held that an attorney appointed to represent an indigent criminal defendant in a federal prosecution was not entitled , as a matter of federal law, to absolute immunity in a subsequent state malpractice action. The Court explained that appointed counsel are subject to the same duties and obligations as retained counsel. The Court distinguished the public defender from a judge or prosecutor, noting that the latter serve broad societal interests and are subject to conflicting claims. Immunity is necessary to forestall an

atmosphere of intimidation, and to insure that they have maximum ability to deal fearlessly with the public. In contrast, the public defender is obligated to serve the undivided interest of his client. *See Sellars v. Procunier*, 641 F.2d 1295, 1299 n.7 (9th Cir.), cert. denied, 102 S.Ct. 678 (1981); *see also Polk County v. Dodson*, ___ U.S. ___ , 102 S.Ct. 445 (1981)(public defender is the functional equivalent of a privately retained attorney).

Ferri did not actually overrule *Miller* because the issue presented was limited to federal preemption of state law governing immunity in malpractice actions. *See Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982)(reaffirming rule of absolute immunity for public defenders). Nonetheless, the *Ferri* Court's refusal to extend the immunity accorded judges and prosecutors to appointed counsel undercuts the basis for *Miller*. *See Hall v. Quillen*, 631 F.2d 1154 (4th Cir. 1980)(*Ferri* casts considerable doubt on the continuing validity of *Minns*), *cert. denied*, 102 S.Ct. 999 (1982); *White v. Bloom*, 621 F.2d 276, 280 (8th Cir. 1980)(public defenders subject to suit under section 1983), *cert. denied*, 449 U.S. 995 (1980), 449 U.S. 1089 (1981).

We conclude that *Miller* cannot survive the rationale of *Ferri*, and that *Ferri* and *Polk County v. Dodson*, *supra*, are inconsistent in principle with any immunity, qualified or absolute, of public defenders

charged with conspiring with state officials in violation of 42 U.S.C. § 1983. We reach this conclusion with some reluctance, because we are mindful of the burden our decision may place on already-overburdened public defenders' offices. Nevertheless, we can construe *Ferri* and *Polk County* no other way.

AFFIRMED in part, REVERSED in part and REMANDED.

Footnotes

1. The district court did not address the preliminary issue of whether Glover alleged that defendants acted under color of state law. "[A] public dfedner does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County v. Dodson*, ___ U.S. ___ 102 S.Ct. 445, 453 (1981). Thus a suit alleging constitutional violations on the part of a public defender acting alone would not state a claim under section 1983. In this case, however, Glover alleged that the public defenders conspired with state officials. Private parties who conspire with a state official acting in his official capacity do act under color of state law. *Dennis v. Sparks*, 449 U.S. 24, 29 (1980). In *Sparks*, the Court held that a complaint which alleged a conspiracy between a state judge and two private defendants to cause an injunction to be corruptly issued, satisfied the color of state law requirement. Glover's allegations of conspiracy were somewhat vague. On remand the district court may require more specificity, but at this stage we are satisfied that Glover's allegations of color of state law are not fatally deficient on their face.

UNITED STATES DISTRICT COURT
DOCKET SHEET

DATE	NR.	PROCEEDING
1980		
Dec 12	1	Motion for Leave to Proceed in Forma Pauperis
12	2	ORD allowing pltf to proceed f/p; directing complt to be filed and served upon defts.
12	3	Complaint
12	-	issd summons
1981		
Jan 9	4	Retn of serv of s/c - deft Babcock served 1/8/81.
19	5	Retrn of servc of s/c on Deft. Tower - EXECU 1/12/81
29	6	Defts' mot to dism w/memo. MC 2/24/81 na
Feb. 2	7	Pltf's notice to court that a traverse will be filed within 20 days.
18	8	Pltf's Travers to defts' Motion to dismiss and Answer to Complaint.
Mar 4	9	Pltf's memo to court. Docket Check: 5/10/81
Apr 3	10	Ord - defts' mot to dism granted & action dism. BE

3	11	Judgment - action dismissed. Entered: 4/3/81. Clerk
3	--	Copies of #10 & 11 mailed to plf & Atty Gen w/entry date endorsed on #11.
7	12	Pltf's NOTICE OF APPEAL fr judgment entered 4/3/81
		#11 microfilmed 4/13/81
May 1	-	Mailed Certificate of Record to Court of Appeals
1	-	Mailed copy of Certificate and docket to Assist. Atty General Lisa Brown.
1	-	Mailed copy of Certificate, Docket and file to Plaintiff.
Jun 11	13	Appellant's Designation of Records
Jul 27	14	Copy of Order from Court of Appeals granting Appellee until 8/12/81 to file its brief.
Aug 13	15	Appellee's Designation of Clerk's Record
19	--	Mailed Clerk's Record on Appeal
19	--	Mailed copy of Title Page, Index, Certificate and docket to plaintiff and Assistant Attorney General James Mountain, Jr.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1988

BRUCE TOWER, Public Defender of
Douglas County, Oregon and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioner,

vs.

BILLY IRL CLOVER,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. SLOTTEE
Northwestern Legal Clinic
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, OR 97204

TABLE OF AUTHORITIES

Cases cited

STATUTORY PROVISIONS

QUESTION PRESENTED

Whether public defenders who conspire with public officials to deprive an indigent client of his constitutional rights are subject to liability under 42 U.S.C. §1983.

REASONS FOR DENIAL OF WRIT

This case presents an important issue of Federal law, but it is an issue which the Ninth Circuit decided in accordance with guidelines established by prior Supreme Court decisions. Further explication of this issue is unnecessary.

The decision of the Ninth Circuit Court of Appeals is a natural extension of this Court's decisions in Ferri v. Ackerman, 444 U.S. 193 (1979) and Polk County v. Dodson, 454 U.S. 312 (1981). In Ferri this Court held that the nature of court-appointed counsel parallels that of privately retained counsel, and therefore federally granted immunity is inappropriate. In Polk County this Court held that public defenders do not act under color of law in performing their duties since their function is similar to that of a court appointed attorney, and are therefore not subject to liability under 42 U.S.C. §1983. Dennis v. Sparks, 449 U.S. 478 (1980), held that public defenders who conspire with public officials are subject to §1983. The Ninth Circuit correctly applied the reasoning of these decisions to this case in deciding that public defenders are not absolutely immune from liability under 42 U.S.C. §1983 when it is alleged that a client has been deprived of his constitutional rights pursuant to a conspiracy between his public defenders and public officials.

The conflict in the Circuit Courts of Appeal on this issue is, except for Black v. Bayer, 672 F2d 309 (3rd Cir. 1982), the result of decisions made prior to this Court's decision in Ferri and Polk County. The Fourth Circuit questioned their prior contrary decision of Minns v. Paul, 542 F2d 899 (4th Cir. 1976) in the more

recent decision of Hall v. Quillen, 631 F2d 1154 (4th Cir. 1980). As a result of the Ferri decision the Fourth Circuit now recognizes that Minns v. Paul may no longer be valid. The Fourth Circuit appears ready to adopt the reasoning of the Ninth Circuit. Robinson v. Bergstrom, 579 F2d 407 (7th Cir. 1978) and Housand v. Heiman, 594 F2d 293 (2d Cir. 1979), granted public defenders immunity contrary to the decision of the Ninth Circuit. However, these cases were decided prior to Polk County and Ferri.

Black v. Bayer, 672 F2d 309 (3rd Cir. 1982) was decided subsequent to Ferri and Polk County, and did not follow the Ninth Circuit on this issue. The Black Court held that absolute immunity should be granted to public defenders who were acting within the scope of their professional duties. The Court did not discuss the alleged existence of a conspiracy and did not recognize the possible existence of a conspiracy in their decision. Actions which amount to a conspiracy cannot be considered as actions within the scope of a public defender's professional duties. The decision of Black v. Bayer appears to focus on facts different from the facts of this case, and is therefore a decision based on other grounds.

Respondent recognizes the valuable role public defenders play in our court system. However, the solution to the potential problem of frivolous suits is not to deny legitimate claimants access to the courts by adopting a restrictive view of 42 U.S.C. §1983. The role of the Courts in hearing legitimate claimants and in holding counsel accountable for any misconduct should not be compromised by the desire to prevent frivolous lawsuits.

DISCUSSION

1. The Ninth Circuit Court of Appeals correctly applied the reasoning of Ferri v. Ackerman, 444 U.S. 193 (1979) to the present case.

In Ferri, respondents argued that unless immunity was granted

in the liability of appointed counsel. It was argued that competent attorneys would therefore be unwilling to represent indigent defendants, and court appointed attorneys would be deterred from exercising their unfettered discretion. Ferri, 444 U.S. at 200-204. This court rejected these arguments, and held that court-appointed counsel did not have absolute immunity from liability.

The Court reasoned that the primary office performed by appointed counsel parallels the office of privately retained counsel. The primary rationale for granting immunity to public officials does not apply to defense counsel sued for malpractice by his own client. Immunity is inappropriate because the principal responsibility of defense counsel is to serve the undivided interests of his client. Immunity is appropriate for public officials because they represent the broad public interest. Id at 203-4. The decision in Ferri should be extended to cover public defenders.

2. Public Defenders do not act in a quasi-judicial capacity as do prosecutors.

A public defender's duty is to advance the undivided interests of his client as personal counselor and advocate. Polk County v. Dodson, 454 U.S. 312 (1981). Immunity is granted to public officials who act in a judicial or quasi-judicial capacity. Immunity is inappropriate for public defenders because their function as counsel is neither judicial nor quasi-judicial.

The public defender's role in representing the interests of a client is the antithesis of the function of judges and prosecutors, which is to represent broad public interests. Under this functional test, the public defender does not serve in a capacity comparable to judges and prosecutors and immunity is therefore inappropriate. Id at 453.

3. Actions amounting to an alleged conspiracy are not within the scope of the professional duties of public defenders.

The petitioner suggests that the reasoning of Black v. Bayer, 672 F2d 309 (1982), is the most appropriate rule to follow for this case. The court in Black held that court appointed counsel acting within the scope of their professional duties are absolutely immune from civil liability under 42 U.S.C. §1983.

Respondent alleged that he was deprived of his constitutional rights pursuant to a conspiracy between his public defenders and public officials.

The court stated that as a matter of public policy, court appointed counsel should not have to bear the costs of defending themselves in subsequent suits brought by indigent clients. Id at 316. The court found that color of state law did not attach to the functions of court appointed counsel. However, the alleged acts of conspiracy cannot be considered as functions of counsel within the scope of their professional duties.

4. Immunity for Public Defenders is contrary to common law and therefore should be statutorily and not judicially granted.

In Ferri v. Ackerman, 444 US 193 (1979) this Court held that if appointed counsel are deterred from representing indigent clients due to inadequate compensation or fear of unwarranted malpractice suits, the legislature rather than the courts, is a more appropriate forum in which to address these concerns. The threat of suit exists for all court appointed counsel who do not meet their professional responsibilities. Judges and prosecutors have absolute immunity from liability under 42 U.S.C. §1983, in part since both have a long tradition of common law immunity from civil suits. Pierson v. Ray, 386 U.S. 547, 553-4 (1967); Imbler v. Pachtman, 424 US 409 (1976). There is no common law tradition of immunity for public defenders. The legislature is

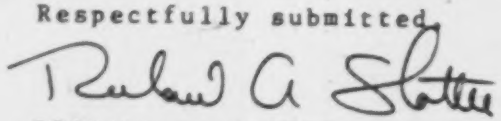
the proper forum to consider immunity for public defenders.

The need to prevent frivolous suits should not be met at the expense of those with legitimate grievances. By making public defenders immune from suit the Court would be in effect denying legitimate claimants access to the courts. It would also lessen the ability of an indigent client to hold counsel accountable for any misconduct. The desire to prevent spurious suits should be accomplished by enabling the court system to cope with these claims rather than by denying legitimate claims.

CONCLUSION

For the reasons set forth above, and for those in the opinion of the Ninth Circuit Court of Appeals, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



RICHARD A. SLOTTEE
Northwestern Legal Clinic
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, OR 97204
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1988

BRUCE TOWER, Public Defender of
Douglas County, Oregon, and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioners,

vs.

BILLY IRL GLOVER,

Respondent.

Certificate of Service

I hereby certify that on this 27th day of July, 1983, a copy of the respondent's Motion and Affidavit for Leave to Proceed in forma pauperis, and Brief in opposition to Petition for Writ of Certiorari, were mailed, postage prepaid, to the following as counsel for petitioners:

JAMES E. MOUNTAIN, JR.
Deputy Solicitor General
100 Justice Building
Salem, OR 97310

I further certify that all parties required to be served have been served.

Richard A. Slottee

RICHARD A. SLOTTEE
Counsel for Respondent
Northwestern Legal Clinic
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, Oregon 97204

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 82-1988

Bruce Tower and Gary Babcock (Petitioner or Appellant) vs. Billy Irl Glover (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Billy Irl Glover

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature X Richard A Slottee

(Type or print) Name RICHARD A. SLOTTEE

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Northwestern Legal Clinic

Address 310 S.W. Fourth Avenue, Suite 1018

City & State Portland, Oregon Zip 97204

Phone (503) 222-6429

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

Office-Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1988

BRUCE TOWER, Public Defender of
Douglas County, Oregon, and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioners,

vs.

BILLY IRL GLOVER,

Respondent.

Motion For Leave to Proceed
In Forma Pauperis

Respondent BILLY IRL GLOVER, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The affidavit of the Respondent in support of the motion is attached hereto.

RICHARD A. SLOTTEE
Counsel for Respondent
Northwestern Legal Clinic
1018 Board of Trade Building
310 S.W. Fourth Avenue
Portland, Oregon 97204

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1988

BRUCE TOWER, Public Defender of
Douglas County, Oregon, and
GARY BABCOCK, Public Defender of
the State of Oregon,

Petitioners,

vs.

BILLY IRL GLOVER,

Respondent.

Affidavit in Support of Motion to
Proceed on Appeal in Forma Pauperis

STATE OF OREGON)
) ss.
County of Multnomah)

I, BILLY IRL GLOVER, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

1. I am presently employed. My gross salary is $500 per month. My place of employment is:

   Family Metal Clad Buildings
   Post Office Box 382
   Creswell, Oregon 97426

2. Within the past twelve months I have received no income from a business, profession, or from any other form of self-employment. During this period I have received no rent payments, interest, dividends or money from any other source. My sole source of income has been my employment listed in #1 above.

3. I own a checking account, the total value of which is approximately $100.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or any other valuable property.

5. I have two daughters who are dependent upon me for support. They are:

   Ladena L. Glover - 10 years old
   Cherlle J. Glover - 16 years old

6. Leave to proceed in Forma Pauperis was sought and granted in the United States Court of Appeals for the Ninth Circuit.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Billy Ire Glover

BILLY IRE GLOVER

SUBSCRIBED AND SWORN to before me this 21st day of June, 1983.

Esther M. Glover

NOTARY PUBLIC FOR OREGON
My Commission Expires: 1-10-85

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1988

BRUCE TOWER, Public Defender of
Douglas County, Oregon, and
GARY BABCOCK, Public Defender of
the State of Oregon,

Petitioners,

vs.

BILLY IRL GLOVER,

Respondent.

Affidavit of Mailing

STATE OF OREGON)
) ss.
County of Multnomah)

I, RICHARD A. SLOTTEE, being first duly sworn, depose and say that I am a member of the Bar of the Supreme Court and the attorney for respondent in the above entitled case; that to the best of my knowledge the original and ten (10) copies of the Respondent's Motion and Affidavit for Leave to Proceed In Forma Pauperis, the Brief in opposition to Petition for Writ of Certiorari, the Appearance Form, and the Certificate of Service were mailed, first class, postage prepaid, to the Clerk of the Supreme Court of the United States on July 27, 1983.

Richard A Slottee

RICHARD A. SLOTTEE
Counsel for Respondent

SUBSCRIBED AND SWORN to before me this 27 day of July, 1983.

Sara P. Brandmuller

NOTARY PUBLIC FOR OREGON
My Commission Expires: 4-8-86

Office - Supreme Court, U.S.
FILED
NOV 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1988

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender of Douglas County, Oregon, and GARY BABCOCK, Public Defender of the State of Oregon,

Petitioners,

v.

BILLY IRL GLOVER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
***JAMES E. MOUNTAIN, JR.**
Solicitor General
MICHAEL D. REYNOLDS
WILLIAM F. NESSLY, JR.
ROY E. PULVERS
Assistant Attorneys General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Whether 42 U.S.C. § 1983 authorizes a convicted person to assert a claim for damages against the public defenders who represented him at his criminal trial and appeal, on a theory that the public defenders deprived him of his constitutional rights pursuant to a conspiracy with state judges and administrative officials.

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Other Authorities — Continued

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Glover v. Tower*, 700 F.2d 556 (1983). In its opinion and ensuing judgment, the Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the United States District Court for the District of Oregon, which had dismissed respondent (then plaintiff) Glover's civil rights action for failure to state a claim. The opinion of the Ninth Circuit Court of Appeals is included at Joint Appendix 41. The unreported order of the United States District Court for the District of Oregon is included at Joint Appendix 36.

JURISDICTION

Jurisdiction to review the Court of Appeals judgment by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Ninth Circuit was dated and filed on March 1, 1983. The judgment sought to be reviewed was entered on the same date. The petition for a writ of certiorari was filed on May 31, 1983, within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rules 20 and 28(1) of

the Court. An order granting the petition for a writ of certiorari was issued by this Court on October 3, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Resolution of the issue presented in this case principally involves the Sixth and Fourteenth Amendments to the United States Constitution, and the federal statute authorizing civil actions for deprivation of rights, 42 U.S.C. § 1983.

United States Constitution, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence [sic]."

United States Constitution, Amendment XIV provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State statutes establish the offices of the petitioner public defenders in this case. In Oregon the Office of County Public Defender is described in Oregon Revised Statutes [hereinafter Or. Rev. Stat.] §§ 151.010 - 151.090. The Office of State Public Defender is delineated in Or. Rev. Stat. §§ 151.210 - 151.290. These laws are set out in the Appendix to the brief.[1]

STATEMENT OF THE CASE

1. Summary of Facts

While incarcerated in the Oregon State Penitentiary, respondent Glover filed an action under 42 U.S.C. § 1983 against Douglas County Public Defender Bruce Tower and Oregon State Public Defender Gary Babcock. (J.A. 3). Glover's *pro se* complaint was made on a form provided by the United States District Court for the District of Oregon. (J.A. 2). Glover complains of an alleged

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[1]Or. Rev. Stat. §§ 151.010 - 151.290 are set out as they appear in the 1981 compilation of Oregon statutory law. The 1983 Oregon Legislature made minor amendments to Or. Rev. Stat. § 151.040, 151.230 and 151.280. A misreference to Or. Rev. Stat. § 1.51.010(3) in Or. Rev. Stat. § 151.040(1) was corrected to refer to Or. Rev. Stat. § 151.010(2). The minor amendments to Or. Rev. Stat. § 151.230 and 151.280 are inconsequential and not pertinent to this Court's review. The 1983 amendments have not yet been printed in the official compilation.

"conspiracy by state officials acting under a color of state authority to deprive [him] of his civil rights * * *." (J.A. 2-10). The gist of Glover's complaint is that his public defenders at trial and on appeal violated his constitutional rights by engaging in a far-flung and facially bizarre conspiracy with trial judges, a judge of the Oregon Court of Appeals, and named and unnamed state administrative officials to secure and to sustain his conviction on a felony charge brought by the State of Oregon. (J.A. 8-9).

Glover alleges that his trial attorney, petitioner Tower, a county public defender, conspired with state trial court judges to deprive Glover of his liberty by refusing to discharge the responsibilities and obligations of a court-appointed defense counsel. (J.A. 5). Tower allegedly conspired with state officials to prevent Glover from presenting a defense of mental disease or defect in his criminal prosecution. (J.A. 6). Glover also claims that Tower, by refusing to withdraw from the case, participated in a conspiracy to deprive Glover of his right to defend himself. (J.A. 7).

Glover alleges that petitioner Babcock, the state public defender, deliberately deprived him of a fair and adequate state court appeal of his criminal conviction. (J.A. 8).[2] Glover maintains that Babcock

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[2]The Oregon Court of Appeals decision in the matter giving rise to this controversy is reported as *State v. Glover*, 32 Or. App. 177, 573 P.2d 780 (1978) (summary affirmance of conviction "from the bench").

refused to obtain printed portions of the trial record, prepared an inadequate opening brief, and refused to correct the brief upon Glover's request. (J.A. 8). Glover alleges that pursuant to a conspiracy, public defender Babcock, like public defender Tower, knowingly and deliberately deprived him of his basic civil rights to defend himself against serious criminal charges. (J.A. 9).

Glover also alleges that members of the judicial and executive branches of Oregon government participated in the conspiracy against him. He claims that "state agents" not only persuaded petitioner Tower to do nothing to prepare for Glover's defense, but that they also persuaded trial court judges to ignore his requests for redress. (J.A. 6-7).

Glover maintains that the purpose of the conspiracy was to prevent him from disclosing dishonest actions by state officials. (J.A. 8-9). The alleged mastermind of the conspiracy was a former Oregon Attorney General who, in his capacity as a court of appeals judge, placed himself on the panel that reviewed Glover's criminal appeal. (J.A. 9). In his complaint, Glover prays for no compensatory damages. He seeks $5 million in punitive damages from public defender Tower and the same amount from public defender Babcock. (J.A. 5).

2. Procedural History

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, petitioner public defenders Tower and Babcock moved for dismissal of Glover's complaint on the ground that it failed to state a claim upon which relief could be granted. (J.A. 11). In the memorandum supporting their dismissal motion, Tower and Babcock maintained that Glover's purported § 1983 action against them should be dismissed because, as public defenders, they were absolutely immune from liability under § 1983 for acts performed in representing a defendant in a criminal prosecution. (J.A. 12). Tower and Babcock expressly relied upon the opinion of the Ninth Circuit Court of Appeals in *Miller v. Barilla*, 549 F.2d 648, 649 (1977), in which the court held "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in performance of his judicial functions as a public defender." (J.A. 12).

The United States District Court for the District of Oregon entered an order granting petitioners' motion to dismiss. (J.A. 36-38). Citing *Miller v. Barilla*, the District Court ruled in its unreported order that "* * * plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function." (J.A. 37). Thereupon, the District Court entered a judg-

ment dismissing Glover's action. (J.A. 39). Glover appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the portion of the District Court's order which had ruled that public defenders Tower and Babcock were immune from liability under § 1983. The Court of Appeals reasoned that its precedent in *Miller v. Barilla* was no longer good law in light of this Court's subsequent decision in *Ferri v. Ackerman*, 444 U.S. 193 (1979). The Ninth Circuit panel concluded "that *Miller* cannot survive the rationale of *Ferri*," and that "*Ferri* and *Polk County v. Dodson*, [454 U.S. 312 (1981)], are inconsistent in principle with any immunity, qualified or absolute, of public defenders charged with conspiring with state officials in violation of 42 U.S.C. § 1983." *Glover v. Tower*, 700 F.2d at 558, 559. (J.A. 44, 45-46).

This Court granted certiorari to review the Ninth Circuit decision, which is in conflict with the decision of the Court of Appeals for the Third Circuit on the issue of public defender immunity from § 1983 liability in *Black v. Bayer*, 672 F.2d 309 (1982).

SUMMARY OF ARGUMENT

Respondent Glover asserts in his § 1983 complaint that his public defenders, pursuant to a conspiracy with state judges and administrative officials, deprived him of his constitutional rights

during his state criminal prosecution. Public defenders who represent indigent criminal defendants like Glover at trial and on appeal are absolutely immune from liability for damages under § 1983. A rule of absolute immunity for public defenders acting under color of state law by virtue of an alleged conspiracy with state officials is consistent with the legislative history of § 1983. In enacting the Ku Klux Klan Act of 1871, Congress sought to provide an effective means of redress for blacks subjected to vigilante terrorism. The Act provided a remedy for victims of crime when state courts and prosecutors were loathe to seek and impose criminal punishment. There is no basis to assume that Congress would have intended to deprive public defenders who are sued by convicted clients of defenses rooted in common law and the policy to protect the unfettered discharge of their functions.

Although public defender offices did not exist during the nineteenth century, a rule of absolute immunity for public defenders finds roots in the common law at the time 42 U.S.C. § 1983 was enacted. The common law provided immunity from liability in defamation suits for attorneys involved in judicial proceedings. One of the policies served by that immunity was the assurance that counsel could act without intimidation during the judicial process.

The recognition that judges and prosecutors must be free to act without intimidation has prompted this Court to recognize that § 1983 does not authorize damage claims against them for acts in the performance of their respective roles in criminal proceedings. Many of the considerations that have prompted recognition of judicial and prosecutorial immunity, such as to insure that these officials may act without intimidation, apply to public defenders whose responsibility is to provide constitutionally mandated legal assistance to indigent criminal defendants as part of a legislatively or judicially established program in or for a particular jurisdiction.

Moreover, many of the judgments which a public defender must make are functionally comparable to the judgments made by prosecutors and judges. This court has recognized that judges and prosecutors must have absolute immunity from § 1983 suits so that they will have the freedom necessary to make impartial judgments. Public defenders must also have absolute immunity to give them the freedom to make impartial judgments for the good of their clients, the judicial process and society.

Absolute immunity for public defenders is required to prevent overburdening the judicial system and to enable the states to fulfill their responsibility to provide effective assistance of counsel to indigent

criminal defendants. Public defender programs have been created as a response to a tremendous increase in the demand for proficient defense attorneys to assist indigent persons charged with crimes. Public defender programs have been instituted by state courts and legislatures precisely because community responsibility for providing defense services must be discharged with limited government resources. The court below acknowledged that its refusal to extend § 1983 immunity to public defenders would burden already overburdened public defender programs. Because these programs have an important bearing on the effectiveness of the judicial process in providing counsel to indigent criminal defendants, exposure of public defenders to § 1983 liability will burden the judicial process.

Allowing indigent criminal defendants to sue their public defenders under § 1983 will overburden the judicial process in two ways. It will overburden the federal judiciary because it will result in a flood of frivolous lawsuits by disgruntled indigent defendants, many of which will be brought *pro se*. Allowing indigent criminal defendants to sue their public defenders will overburden the state criminal justice systems because the public defenders' time, attention and limited resources will be diverted from effective defense of their clients. Ineffective representation of indigent criminal defendants will result

in slower judicial resolution of criminal cases both at trial and on appeal.

Qualified immunity for public defenders will not prevent a flood of meritless litigation and will do nothing to alleviate the burden such litigation will create for the judiciary and public defenders. It is the litigation itself more than the threat that a public defender ultimately may be found liable under § 1983 which causes the greater damage because the litigation forces the reallocation of scarce, fixed resources. The absence of absolute immunity will inhibit the ability of public defenders effectively to represent their clients and to contribute to the state judicial process.

Allowing indigent criminal defendants to sue their public defenders under § 1983 creates a conflict of constitutional dimension. Indigent criminal defendants have the right to effective assistance of counsel in state criminal prosecutions under the Sixth and Fourteenth Amendments. The exposure of public defenders to § 1983 lawsuits with the attendant diversion of their attention, time and resources necessarily will impede their ability to provide quality defense services to their indigent clients, and will frustrate states' efforts to comply with the commands of the Sixth and Fourteenth Amendments through public defender programs.

Finally, recognition of a rule of absolute immunity for public defenders from liability for damages under § 1983 would not leave the represented criminal defendant without a remedy for a public defender's negligent or wrongful acts or omissions. The defendant has access to myriad state and federal post-conviction remedies to correct ineffective assistance of defense counsel. Public defender misconduct may be remedied by resort to state tort actions, federal criminal proceedings, or state bar disciplinary proceedings. Existence of other means to correct and prevent constitutional abuse by public defenders undermines any argument that a federal § 1983 tort action for damages is the only way to insure that clients will not suffer constitutional violations at the hands of their public defenders.

In short, statutory history and pertinent policies support recognition of absolute immunity for the public defenders sued under § 1983 in this case.

ARGUMENT

In this suit for damages under 42 U.S.C. § 1983, the Court of Appeals for the Ninth Circuit erroneously held that petitioner public defenders were neither absolutely nor qualifiedly immune from liability to a former client who alleged that petitioners had conspired with state officials to deprive him of his constitutional rights while representing him

in a criminal prosecution.[3] The court reached this conclusion "with some reluctance" because it was aware that its decision might place a burden "on already burdened public defender's offices." *Glover v. Tower*, 700 F.2d at 559. Nevertheless, the court felt compelled by this Court's decisions in *Ferri v. Ackerman*, 444 U.S. 193 (1979) and *Polk County v. Dodson*, 454 U.S. 312 (1981) to reverse the District Court's dismissal of the *pro se* complaint filed by the then-incarcerated plaintiff, respondent Glover.

The Court of Appeals analysis is fundamentally flawed. The decision in *Ferri v. Ackerman* did not deal with the scope of a federal cause of action under 42 U.S.C. § 1983. *Ferri* held that the Criminal Justice Act of 1964 did not establish a federal immunity for federal court-appointed counsel that would preempt the maintenance of a state malpractice action. In *Polk County v. Dodson*, 454 U.S. at 317 n. 4, this Court did not reach the question whether a public defender is entitled to the same absolute immunity from damages under § 1983 as judges and prosecutors; the Court held that a public

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[3]Glover's complaint is indicative of how a disgruntled client could hale a state public defender into federal court under the purported auspices of § 1983 to litigate issues of ineffective assistance of counsel. Although Glover couched his complaint in the metaphor of conspiracy, he essentially alleged that his trial counsel, county public defender Tower, failed adequately to investigate and present evidence of the defense of mental disease or defect. (J.A. 6). Glover also alleged that Tower deprived him of his right to represent himself by refusing to withdraw from the case. (J.A. 7). Glover's appellate counsel, state public defender Babcock, allegedly failed to obtain the entire trial court record, prepared an inadequate appellate brief, and refused to correct the brief when Glover requested him to revise it. (J.A. 8).

defender does not act under color of state law for the purposes of § 1983 when performing the traditional functions of counsel to a criminal defendant. 454 U.S. at 325.

In the present case, however, the conspiracy allegations of the complaint cast the color of state law over the actions of the public defenders. *Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980). Thus, this case squarely presents the issue which this Court reserved in *Polk County*. The Court of Appeals failed to analyze the public defenders' claim of immunity in light of the pertinent statutory history, the common law history of relevant immunities, and the policies underlying those immunities. The Court of Appeals failed to look beyond the role public defenders principally perform in representing their clients and refused to recognize that public defenders also play another special role in the administration of justice. Due consideration of these factors compels the conclusion that § 1983 does not authorize the damages suit brought by Glover.

I. A rule of absolute immunity of public defenders from Section 1983 damages liability is consistent with the purpose and legislative history of the statute and is mandated by applicable common law principles.

A. *The legislative history of Section 1983 demonstrates that Congress did not intend to restrict the*

application of common law defenses in actions brought by persons who claim that they were wrongfully convicted of crimes as a result of a violation of their constitutional rights.

The question of immunity under § 1983 is essentially a matter of statutory construction. *See Owen v. City of Independence*, 445 U.S. 622, 635 (1980). In enacting the law, Congress intended to create a species of tort liability in favor of persons deprived of rights secured by the Constitution and federal laws. *Monroe v. Pape*, 365 U.S. 167, 180, 183 (1961), *overruled on other grounds*, *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978); *Carey v. Piphus*, 435 U.S. 247, 253 (1978). The terms of the enactment do not suggest qualifications on the maintenance of the right of action it establishes. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). However, this Court's decision in *Tenney v. Brandhove*, 341 U.S. 367 (1951), "established that § 1983 is to be read in harmony with the general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. at 418. Therefore, in the absence of congressional guidance, § 1983 must be read in the context of established common law tort principles and policies. The extent to which a public defender acting under color of state law is amenable to a § 1983 damage action depends upon a principled

examination of the immunities traditionally afforded similarly situated individuals and the present-day significance of the public interests which those principles of immunity promote. *See Imbler*, 424 U.S. at 421.

The historical context of the enactment of § 1 of the Ku Klux Klan Act of 1871, 17 Stat. 13, is the touchstone for the Court's inquiry into the field of common-law tort defenses and the public interests which they reflect.

> "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

Although public defenders such as petitioners did not exist in 1871,[4] the legislative background of the

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[4]The initial public defender program in the United States was not established until 1914. Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 Wis. L. Rev. 473, 476. The State of Connecticut instituted the first state public defender system in 1917. *See State v. Hudson*, 154 Conn. 631, 635, 228 A.2d 132 (1967). Ninety years after the enactment of 42 U.S.C. § 1983, and two years before the Court established an indigent felony defendant's right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), public defender offices served only three percent of the counties in the United States. Mounts, *supra*, 1982 Wis. L. Rev. at 476. By 1973, however, public defender programs were in operation in 28 percent of the nation's counties and served two-thirds of the population. *Id.* at 481 n. 10; Benner & Neary, *The Other Face of Justice* 72 (1973).

Civil Rights Act of 1871 provides insights that permit an educated analysis of the probable response of the 42nd Congress to the question of a public defender's immunity from damages in an action brought by a convicted client pursuant to the statute. *See* Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 64 (1980). These perspectives suggest that Congress would have intended to extend immunity to public defenders.

The overriding impetus for the enactment of 42 U.S.C. § 1983 was the unpunished exercise of vigilante terrorism against the newly freed blacks and their sympathizers in the post-Civil War South. *See Briscoe v. Lahue*, ___ U.S. ___, 103 S. Ct. 1108, 1116-1117 (1983). The Civil Rights Act of 1871 had three major purposes. One was to provide a federal remedy where state law was inadequate to the task. Another broader goal was to provide a remedy when state court enforcement was available in theory but denied as a result of the disinclination of state officials to exercise their authority to prevent or punish the wrongdoing of the Klan. *Monroe v. Pape*, 365 U.S. at 173-175.[5] Thus, the historical objective of the enactment was not to pave an avenue of redress for individuals who were convicted in state

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[5]The third aim, not relevant here, was to override certain state laws. *See Monroe v. Pape*, 365 U.S. at 173.

courts by wrongful means, but rather to provide an alternative remedy when the state courts and prosecutors were loathe to seek and to impose criminal punishment.

The plaintiff in this case seeks $10 million in punitive damages based on a claim that he stands convicted of a crime as the result of a conspiracy to deprive him of an adequate defense at his state trial and on appeal. An analogy to plaintiff's charges of conspiracy exists in the claim of an individual that he or she was convicted on the basis of perjured testimony pursuant to collusion between a state agent, such as a prosecutor, and a witness. This Court previously stated, however, that the history of the Act:

> "* * * does not * * * tend to show that Congress intended to abrogate witness immunity in civil actions under § 1, which applied to wrongs committed 'under color of law.' The bill's proponents were exclusively concerned with perjury resulting in unjust *acquittals*—perjury likely to be committed by private parties acting in furtherance of a conspiracy—and not with perjury committed 'under color of law' that might lead to unjust *convictions*. In hundreds of pages of debate there is no reference to the type of alleged constitutional deprivation at issue in this case: perjury by a *government official* leading to an unjust conviction." *Briscoe v. Lahue*, 103 S. Ct. at 1118. (Emphasis in original.)

The legislative history contains no significant indication that Congress specifically designed § 1983

as a remedial device to secure money damages for unjust convictions. There is no basis therefore to assume that Congress would have intended to deprive public defenders who are sued by convicted clients of defenses which find their roots in case law and in the policy of protecting the unrestricted discharge of their functions.

B. *A rule of absolute immunity of public defenders from damages under Section 1983 for actions taken while representing an indigent defendant has substantial foundation in common law.*

Although public defenders offices did not exist in 1871, a rule of public defender immunity would have its roots in a common law privilege applicable to counsel for a party in legal proceedings. If lawyers had practiced as public defenders during the nineteenth century, they would have been accorded absolute immunity at common law from suits for defamatory remarks made by them or their witnesses during judicial proceedings if the remarks were relevant to the matter. *Imbler v. Pachtman*, 424 U.S. at 426 n. 23; 424 U.S. at 439 (White, J., concurring in judgment). This privilege was extended to all counsel in a case and extended to lawyers' statements in pleadings and briefs. 424 U.S. at 426 n. 23. The substantial policy underlying this immunity was the protection of the judicial process in accurately resolving factual disputes in criminal and

civil cases. The specific protective purpose of the immunity from defamation suits was to avoid the risk that counsel would engage in self-censorship during the proceeding due to fear of subsequent defamation suits. 424 U.S. at 439-440 (White, J., concurring in judgment). At common law, a defender would have shared this absolute immunity from defamation suits with his or her prosecutorial counterpart. With regard to prosecutors, this common law immunity and immunity from suit for malicious prosecution have been extended to form the basis for the rule that prosecutors are absolutely immune from § 1983 liability for all prosecutorial conduct that is "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Public defenders should have the same protection from intimidation in performing their role in the judicial process.

In *Imbler v. Pachtman*, this Court held that a prosecutor is immune from § 1983 liability for his or her acts in initiating and presenting the state's case. 424 U.S. at 431. The Court determined that a rule of prosecutorial immunity would serve the policies that formed the basis for the common law immunity of judges. Harassment by unfounded litigation would cause distraction from official duties and inhibition of the required independence of judgment. 424 U.S. at 422-423, 424. Substantially equivalent

concerns prompted the recognition of a rule of absolute immunity from defamation liability for counsel in judicial proceedings.

Petitioners acknowledge that in *Branti v. Finkel*, 445 U.S. 507, 519 (1980), this Court restated the principle of *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979), that the primary responsibility of criminal defense counsel is to serve the interests of the client. The Court in *Branti* contrasted this responsibility of a public defender with the "broader public responsibilities of an official such as a prosecutor." *Branti v. Finkel*, 445 U.S. at 519 n. 7. Petitioners also acknowledge that in holding that public defenders generally do not act under color of state law for the purposes of § 1983, this Court drew the same distinction. In *Polk County v. Dodson*, the Court quoted from *Ferri v. Ackerman*, and concluded that the responsibility of a public defender to advance the undivided interests of his client was essentially a private function. *Polk County v. Dodson*, 454 U.S. 312, 318-319 & n. 8.

Notwithstanding this Court's statements about the respective roles of public defenders and judicial officers, public defenders are entitled to quasi-judicial immunity. The judgments which public defenders are required to make are functionally comparable to those made by judges and prosecutors. This Court stated in *Butz v. Economou*, 438 U.S.

478, 511-512 (1978), *quoting Imbler v. Pachtman*, 424 U.S. at 423 n. 20:

> "Judges have absolute immunity not because of their particular location within the Government but *because of the special nature of their responsibilities.* This point is underscored by the fact that prosecutors—themselves members of the Executive Branch—are also absolutely immune. 'It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well.'" (Emphasis added).

The prosecutor must determine, on the basis of the information available to him in each case, whether to charge an accused, which of alternative charges can be proved and should be punished, the extent of his office's resources which must be invested in order to successfully prosecute the case, and whether the probable result is worth the cost.

> "* * * Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Imbler v. Pachtman*, 424 U.S. at 425-426.

In preparing and presenting the defense case for trial or appeal, the public defender carries out his or her primary function to render effective assistance

of counsel to the defendant by reviewing information, investigating factual questions, researching legal issues, and making legal judgments. The public defender, however, has other responsibilities of a "special nature." *See Butz v. Economou*, 438 U.S. at 512. In addition to making judgments limited to the circumstances of his client's case, the defender, like the prosecutor, must make many institutional decisions under constraints of scarce resources, time, and information that, in the words of *Imbler*, "* * * could engender colorable claims of constitutional deprivation." 424 U.S. at 425. The defender's decision whether, and how thoroughly, to undertake independent investigation of a case will influence the quality of the particular client's representation. The defender, however, must also consider the fact that committing finite investigatory resources to that client's case will necessarily reduce the means available to meet the needs of other clients who have an equal right to effective representation. The public defender, like the prosecutor, must exercise discretion in establishing case priorities; allocating resources to each case according to the seriousness of the offense; assessing the likelihood of success; and determining whether the case presents circumstances that will require additional hearings or other procedures. Therefore, the public defender, who must appear and defend a

substantial percentage of "the hundreds of indictments and trials" for which the prosecutor has an equal responsibility, *Imbler v. Pachtman*, 424 U.S. at 425-426, performs equivalent judgmental functions.

In discharging the responsibility to provide the bulk of indigent defense services in a particular locale or jurisdiction, "[p]ublic defenders are typically required to cope with extremely heavy caseloads * * *." *Black v. Bayer*, 672 F.2d 309, 319 (3d Cir. 1982). The existence of the responsibility for heavy caseloads requires public defenders "* * * to decline to press the frivolous, to assign priorities between indigent criminal defendants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Black v. Bayer*, 672 F.2d at 319, *quoting Minns v. Paul*, 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). The judgments which a public defender is required to make distinguish the defender from private retained counsel, *see Minns v. Paul*, 542 F.2d at 901-902, and are substantially equivalent to exercises of judicial and prosecutorial discretion. These judgments are sufficiently "judicial" in nature to satisfy the functional comparability test for according absolute immunity under § 1983.

II. Absolute immunity for public defenders is required to prevent overburdening the judicial system and to enable the states to fulfill their responsibility to provide effective assistance of counsel to indigent criminal defendants.

In deciding that prosecutors are absolutely immune from § 1983 liability, this Court in *Imbler v. Pachtman* not only looked to applicable common law immunity but also extended and shaped the contours of that immunity to serve the underlying policies in the context of present-day practice. Similar considerations compel recognition of public defender immunity from § 1983 liability.

Federal court consideration of broad-gauged claims like Glover's will seriously burden federal courts and public defenders with the costly task of proceeding through summary judgment on large numbers of inevitably meritless claims. Scarce, fixed resources of the public defender will be diverted to such claims at the direct expense of the quality of individual indigent defense. A further result of a rule—including a grant of qualified immunity—that allows these cases to proceed beyond summary dismissal on the basis of absolute immunity would constrain seriously the professional discretion of the public defender in handling both an overall caseload and individual cases. This Court has highly valued full and free exercise of professional discretion. The interests of the public, the judiciary, the public

defender, and the body of indigent criminal defendants will all be well served by a rule of absolute immunity.

A. *Glover's claim is emblematic of a wide range of frivolous Section 1983 suits which will consume the time and energy of an already overburdened criminal justice system under a rule of no absolute immunity.*

In *Polk County*, Justice Powell candidly acknowledged "the recent burgeoning of post-conviction remedies [that] has undoubtedly subjected the legal system to unprecedented strains * * *." 454 U.S. at 324. In 1980 alone, state prisoners brought 12,397 civil rights actions against public officials in the federal courts. This was a 10.7 percent increase over the previous year and represented a staggering 511 percent increase over the 2,030 filings only ten years before.[6] State prisoners filed 24,975 civil petitions in federal courts in 1982. 1982 Annual Report of the Director of the Administrative Office of the United States Courts 102. The most significant increase in state prisoner civil litigation was in prisoner civil rights petitions, up 7.0 percent in just one year. *Ibid.*

According to a major study, 65 percent of all felony charges and 47 percent of all misdemeanor charges are brought against indigent defendants.

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[6]1980 Annual Report of Administrative Office of the United States Courts 231-232; 1975 Annual Report of the Director of the Administrative Office of the United States Courts 207-209.

Benner & Neary, *supra*, note 3, at Table 117. Last year, over 12 million state criminal cases were charged. *See Michigan v. Long*, ___ U.S. ___, 103 S. Ct. 3469, 3477 fn. 8 (1983). The right to appointed counsel at government expense now extends to a broad range of circumstances, all of which would be subject to § 1983 claims for public defender conspiracies unless immunity is extended.[7]

Indigent criminal defendants commonly perceive the public defender to be an arm of the legal system which is prosecuting them. *E.g.*, Casper, *Did You Have a Lawyer When You Went to Court: No, I Had a Public Defender*, 1 Yale Rev. L. & Soc. Action 4, 6 (1970). Indigent criminal defendants often believe they were afforded second class representation. *See, e.g.*, Lefstein for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Criminal Defense Services for the Poor*, 50 (May 1982).

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[7]Indigents are presently entitled to representation in felonies, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and in misdemeanor cases, *compare Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to appointed counsel in misdemeanor cases involving a loss of liberty) *with Scott v. Illinois*, 440 U.S. 367 (1979) (no right to appointed counsel in misdemeanor case where only a fine is imposed). There is also a right to counsel in juvenile proceedings that result in confinement, *In re Gault*, 387 U.S. 1 (1967); in first appeals of right, *compare Douglas v. California*, 372 U.S. 353 (1963) (right to appointed counsel on first appeal of right) *with Ross v. Moffitt*, 417 U.S. 600 (1974) (appointed counsel not constitutionally required other than on appeals of right); at post indictment lineups, *U.S. v. Wade*, 388 U.S. 218 (1967); at preliminary examinations, *Coleman v. Alabama*, 399 U.S. 1 (1970); probation or parole revocation proceedings, *Mempa v. Rhay*, 389 U.S. 128 (1967); and in civil commitments, *Specht v. Patterson*, 386 U.S. 605 (1967).

The convicted defendant is intimately familiar with the facts of his case and the strategy of the legal defense formulated and presented by his counsel. The absolute immunities of other participants in the process by which a defendant is convicted—the judges who presided over the accused's trial and appeal, *Stump v. Sparkman*, 435 U.S. 349 (1978), the prosecutor who brought and tried the case, *Imbler v. Pachtman*, and the witnesses who testified against the accused, *Briscoe v. Lahue*—leave the public defender as the sole target of the defendant's frustration with his conviction. *See Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

This Court has already determined that the majority of claims against a public defender cannot be cast as suits for civil damages under 42 U.S.C. § 1983. *Polk County v. Dodson*. Yet this Court and other federal courts have aptly noted that the resentment of convicted criminals often blossoms into § 1983 litigation. *E.g., Imbler v. Pachtman*, 424 U.S. at 425; *Minns v. Paul*, 542 F.2d at 902. Without a rule of absolute immunity, the only vent for this frustration, in terms of federal litigation, would be the assertion of meritless conspiracy claims against the public defender.

Conspiracy claims are easy to allege. The vast bulk of litigants inevitably would attempt to circum-

vent *Polk County v. Dodson* by recharacterizing an ineffective assistance of counsel claim as a conspiracy. Glover's claims themselves—e.g., that Tower failed to investigate and present a defense of mental disease or defect, (J.A. 6) or that Babcock would not amend his brief, (J.A. 8) are indicative of the types of public defender actions which may be reconstituted as a conspiracy claim in a § 1983 action.[8]

Public defenders operate under severe pressures on their time and resources. Plea negotiations may be based on information obtained from the prosecutor without an opportunity for independent defense investigation. Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey & Analysis*, Am. Crim. L. Bull. 161, 176 (1974); Lefstein ABA Committee Study, *supra*, p. 27, at 46. Observers of the process note their belief that:

> "* * * because of the importance of obtaining relevant information and thereby performing effectively, the public defender must foster a cooperative relationship with the district attorney's office." Wice & Suwak, *id.*, at 176.

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[8]Failure to make a motion to suppress could readily be recharacterized as a tacit or covert agreement between the prosecutor and the public defender to expose the jury to inadmissible evidence. Failure to call all witnesses a plaintiff claims would have helped his case could be pleaded as a conspiracy between the public defender and the prosecutor to promote the plaintiff's conviction. Claimed inadequate assistance with a petition for habeas corpus could be recharacterized as a conspiracy between the public defender and the prison authorities to keep a plaintiff in jail. A conspiracy claim could be based on an allegation by the convicted defendant that he saw his attorney speak with a state judge in the courthouse before hearings. *See Shaffer v. Cook*, 634 F.2d 1259, 1260 (10th Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

The leap from cooperative to conspiratorial is not great for a disappointed convict.

Innovative and experimental attempts by public defenders to make the criminal justice system more responsive will be curtailed if public defenders are exposed to conspiracy claims. Experiments in expediting trials or appeals, for example, may be implemented to aid defendants; yet the overtones of conspiracy to a prospective § 1983 litigant would be music to a litigious ear.

The foregoing recitation of possible conspiracy claims plainly is not exhaustive. Indeed it is limited only by the inventiveness of prisoners who already file over 12,000 civil rights claims in federal courts annually. *See* 1980 Annual Report of Administrative Office of U.S. Courts, *supra* p. 26 , at 231-232.

As this Court has noted with respect to judges, witnesses, and prosecutors, the intense feelings and significant interests at stake in a criminal trial are likely to produce a losing party who will "accept anything but the soundness of the decision as explanation" of the outcome. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1872). Claims such as Glover's will involve extensive efforts by the courts and the parties, amounting sometimes to a retrial of the core of the original prosecution. This predictable scenario defeats the judicial interest in the finality of judgments. *See Imbler v. Pachtman*, 424 U.S. at

423-427. This Court has repeatedly found, and recognized as important, that "this category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources * * *." *Briscoe v. Lahue*, 103 S.Ct. at 1120; *see also Imbler v. Pachtman*, 424 U.S. at 425.

The overwhelming majority of § 1983 claims like Glover's will be meritless. The Fourth Circuit has written in a case involving public defender liability that:

> "The experience of the federal courts in federal habeas corpus and § 1983 litigation demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties." *Minns v. Paul*, 542 F.2d at 902. [9]

In addition to the expectation of a bulk of meritless claims, the federal courts must be prepared to extend to those claims the special solicitude which must be accorded *pro se* pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972).

Countenancing claims such as Glover's will require federal courts to engage in full summary judgment procedures. *Polk County v. Dodson*, 454 U.S. at 336 (Blackmun, J., dissenting); *Black v.*

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[9] *Accord*, Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 62 Corn. L. Rev. 482, 544 (1982). At least one commentator has suggested that the flood of baseless civil rights filings may hamper overworked federal courts in their endeavors to identify and preserve those cases which may have substantial merit. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 611 (1979).

Bayer, 672 F.2d at 316. Formal summary judgment procedure, *see* Fed. R. Civ. P. 56, may require the public defender to develop evidence and often undertake demanding discovery. In fact, the public defender will be compelled to establish the defense he would have to present at trial. Public defenders may be required under Rule 56 to present the federal district court with a frequently voluminous record and transcript of the state prosecution. Court and counsel would have to examine this record. In most jurisdictions, the expenses must be met by public resources; in some, the resources must be provided by the already sparse appropriations available to the judicial branch of government. Even this scenario, however, is an unreasonably conservative assessment of the burdens on the courts and the public defender. After *Polk County v. Dodson*, a disgruntled client must make additional or reconstituted allegations which require factual controversion by the public defender. Moreover, cases may degenerate into swearing matches or an examination of motive and mental state in which the granting of summary judgment is inappropriate. *See Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468, 473 (1962). The burden on the federal courts required to consider fairly a quantity of meritless claims is plainly an important factor which argues for a grant of immunity.

B. *A rule denying absolute immunity will adversely impact the public defender's ability to represent his clients effectively and will in turn negatively impact the state judicial system.*

Federal court consideration of claims like Glover's will divert the public defender's scarce resources away from effective criminal defense. If the public defender is not able to represent his client effectively because scarce resources have been diverted, the judicial system will suffer. Our discussion has emphasized the burden on the resources of the judicial system which suits such as respondent's will impose. The difficulties of an underfunded delivery system for indigent defense[10] also inhibit the provision of effective indigent defense.

Overwhelming caseloads present the most serious problem to underfunded public defenders. Public defender offices handle caseloads well in excess of generally accepted maximum caseload limits. *See e.g.*, Note, *Work Overload and Defender Burnout*, 35 NLADA Briefcase, 5, 7 (1977) caseloads often exceed recommended guidelines by 50 percent or

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[10]Funding for indigent defense is approaching crisis. *E.g.*, Lefstein ABA Committee Study, *supra*, p. 27, at 57. Only one and one-half percent of all funds for the state criminal justice systems—police, corrections, courts, prosecution, and indigent defense—go to indigent defense. In fiscal year 1978 funds were apportioned: Police 53.2 percent; corrections 24.7 percent; judiciary 13.1 percent; prosecution 5.9 percent. Bureau of Justice Statistics, U.S. Department of Justice, 1980 Source Book of Criminal Justice Statistics 11 (1981).

more). Voluminous literature on techniques of caseload management attests to the universal perception of the problem. *E.g.*, Ligda, *Defender Workloads: The Numbers Game*, 34 NLADA Briefcase 23-35 (1976). In Oregon in 1979 the state Public Defender Committee informed certain courts that the state appellate defender's office could no longer handle every appeal because its lawyers were seriously overburdened. *See State ex rel. Acocella v. Allen*, 288 Or. 175, 604 P.2d 391 (1979). The public defenders were handling 11.8 appeals per lawyer per month, 288 Or. at 177, n. 1, nearly six times the caseload recommended by the National Advisory Commission on Criminal Justice Standards and Goals, Standard 13.12 (maximum of 25 appeals per year suggested).

General case or trial preparation is hindered by the press of caseload and lack of funds. *E.g.*, Lefstein ABA Committee Study, *supra*, p. 27 at 35, 46. Lack of resources for functional or private office space, and inadequate secretarial and paralegal assistance affect the qualify of representation. *Id.* at 11, 12. The unavailability of investigators has a direct and major impact on the number of cases an attorney can handle. Benner & Neary, *supra*, note 3, at 29. Lack of resources for social workers can mean that alternative dispositions are not fully explored.

See generally, Lefstein ABA Committee Study, *supra*, p. 27 at 37.

Public defenders must be able to recruit and retain able public defenders. *Minns v. Paul*, 541 F.2d at 901; *Brown v. Joseph*, 463 F.2d 1046, 1049 (3d Cir. 1972). Low salaries of public defenders contribute to a pattern whereby able lawyers leave the public defender's office after two to three years. Benner & Neary, *supra*, note 3 at Table 20; Benner, Tokenism and the American Indigent: Some Prospectives on Defense Services, 12 Am. Crim. L. Rev. 667, 683 (1975). Exposure to personal liability or re-direction of systemic or personal resources to insurance or defense of claims will only aggravate a critical problem. Working conditions, caseload and lack of support staff already discourage attorneys from pursuing or continuing a career in public defender services. Lefstein ABA Committee Study, *supra*, p. 27 at 36.

Not only will exposure of public defenders to potential liability under § 1983 direct scarce resources away from effective defense but such expense will also constrict public defenders' ability to exercise their professional discretion.

> "Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted

> not only mistakenly but with malice and corruption." *Dennis v. Sparks*, 449 U.S. at 30.

The same policy of ensuring free exercise of independent judgment should apply with equal force to the integral actors who shape and present a case for the court to consider.

As discussed earlier, the Fourth Circuit Court of Appeals aptly stated the particular need for public defenders to retain:

> "the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Minns v. Paul*, 542 F.2d at 901.

Public defender discretion is circumscribed by heavy caseloads and state allocation of resources. *E.g.*, *Polk County*, 454 U.S. at 332 (Blackmun, J., dissenting); Note, *Liability of Public Defenders Under Section 1983: Robinson v. Bergstrom*, 92 Harv. L. Rev. 943, 947 (1979). Limited access to funds for important constituent elements of defense preparation, such as investigatorial services, hinders public defenders in case preparation. Public defenders should not be held liable in suits growing out of discretionary decisions based on institutional resource constraints.

If, as has been demonstrated above, public defenders are hindered by exposure to § 1983

liability in their ability to effectively represent the indigent accused, the state criminal justice system will suffer. The negative impact on the judicial system caused by ineffective representation of criminal defendants was noted in a recent national study of defense services for the poor:

> "Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, *and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers.* There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained." Lefstein ABA Committee Study, *supra*, p. 27 at 2. (Emphasis added).

The need to avert burdens on the judicial process prompted this Court to hold, in *Briscoe v. Lahue*, that § 1983 does not authorize a convicted state defendant to assert a claim for damages against a police officer for giving perjured testimony at the defendant's criminal trial. In that case, the Court acknowledged that the traditional reasons for witness immunity were less applicable to police officer witnesses. Nevertheless, the Court determined that "other considerations of public policy

support absolute immunity more emphatically for such persons than for ordinary witnesses." 103 S. Ct. at 1119.

The Court concluded that unless absolute immunity was extended to police officer witnesses their contributions to the judicial process and effective performance of their other public duties might be compromised. *Ibid.* After noting the probability that § 1983 lawsuits against police officer witnesses would be frequent, the Court said:

> "This category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources. As this Court noted when it recognized absolute immunity for prosecutors in *Imbler*, if the defendant official 'can be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and attention would be diverted from pressing duties of enforcing the criminal law.' 424 U.S. at 425." *Briscoe v. Lahue*, 103 S. Ct. at 1120.

The Court's analysis in *Briscoe* bears directly on the resolution of the issue in this case. Unless the Ninth Circuit's refusal of § 1983 absolute immunity is reversed, a tangible burden will be placed on this already over-burdened public legal resource. As in the case of the police witnesses in *Briscoe*, the contributions of public defenders Babcock and Tower to the Oregon judicial process and their effective performance of their other public duties will be undermined. The Oregon judicial process conse-

quently will be hampered in its attempts to carry out the constitutional mandate that indigent criminal defendants be provided with a lawyer to assist them in their defense. Moreover, because § 1983 lawsuits against public defenders, like lawsuits against prosecutors, can be expected with some frequency, *cf. Bradley v. Fisher*, 80 U.S. at 348, considerable amounts of judicial time and public defender energy will be diverted by frivolous litigation such as the § 1983 suit in this case.

The public defender unlike the appointed private criminal defense attorney performs an institutional role far beyond ad hoc advocacy for a particular accused. The volume of cases, the institutional relationship with prosecutors and courts, and the ability to view needs for systemic changes in the criminal justice process all affect the public defender with a unique capacity broadly to advocate the public interest through establishment of case and issue priorities. This institutional role permits the public defender to pursue legal strategies which benefit the class of indigent defendants far beyond the capacity of members of the private defense bar to whom this Court has not accorded immunity from suit. Experimentation in the states with better means of establishing public defender services will be halted if an immunity which recognizes this institutional law reform role is not conferred.

Because the imposition of potential § 1983 liability on already over-burdened public defender programs would impinge on the judicial process, absolute immunity for public defenders is required. The principles set forth in *Pierson v. Ray*, 386 U.S. 547 (1967) to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to public defenders, who perform a somewhat different function in the judicial process but whose participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable. *Cf. Briscoe v. Lahue*, 103 S. Ct. at 1121. In other words, to afford petitioners Tower and Babcock anything less than absolute immunity from § 1983 damage liability in a case such as this, will disserve state and federal judicial processes.

C. *A grant of qualified immunity will do nothing to stem the tide of meritless, burdensome litigation. A grant of absolute immunity is required.*

A rule of absolute immunity should be recognized for Tower and Babcock in this case.[11] The interposition of qualified immunity fails utterly to discourage the institution of vexatious actions.

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[11]Tower, the county public defender, and Babcock, the state (appellate) public defender, are full-time providers of indigent services. Their compensation and resources are fixed by the government. *See* Appendix to this brief. The primary evil of suits as Glover's is the forced reallocation of critically scarce, fixed resources, away from indigent defense. The problem becomes manifest when an organization exists for the purpose of providing indigent defense and the volume of its work is such that its exposure to suit is great and the prospect and effect of reallocation of resources is real.

"* * * Although it is difficult to make much of these figures, the filings against police officers and prison officials are consistent with the notion that *the qualified immunity defense does not discourage harassing litigation.* The percentage of these suits [alleging constitutional violations] that are dismissed is quite high; nonetheless, the number that proceed to trial is significant, while the instances of liability judgments against defendants are negligible. It is possible that many meritorious claims are being dismissed for inartful pleading and that other meritorious claims are being denied after trial for failure to clear a too-high burden of persuasion. It is at least equally plausible, however, that because of frustration, lack of other means for relief of related grievances, pique, or simply antipathy for the defendant, *many nonmeritorious claims are being brought, consuming considerable judicial resources, entailing sizeable defense costs, yielding few damage awards, but perhaps discouraging some desirable official conduct.*" Cass, *Damage Suits Against Public Officers*, 129 Pa. L. Rev. 1110, 1159 (1981). (Emphasis added).

A rule of qualified immunity[12] imposes substan-

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[12]The Court has granted state and federal *executive* officers only a qualified good faith immunity. An official, upon showing that his challenged actions were not undertaken with an intent to cause injury and did not result in a constitutional violation of which he was or reasonably should have been aware, was deemed immune from damages. *Wood v. Strickland*, 420 U.S 308 (1975). The Court afforded qualified immunity on the assumption that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading." *Butz v. Economou*, 438 U.S. at 507. Experience, however, did not bear out this assumption and the Court, emphasizing the litigation costs of attempting, often unsuccessfully, pretrial determinations of an official's state of mind, abandoned the subjective prong of the *Wood* test for an objective inquiry as to whether the official's conduct violated established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 102 S. Ct. at 2737-2739. The same concerns which prompted the Court in *Harlow* to limit the scope of the qualified immunity inquiry require the grant of absolute immunity from § 1983 damage actions to public defenders.

tial and unavoidable costs on the parties and the judicial system. Such an immunity merely recognizes the existence of an affirmative defense which must be pleaded by the defendant. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Therefore, the recognition of a qualified immunity locks the courts and the public defender into the time and expense of the summary judgment process. The efficiency with which insubstantial lawsuits may be eliminated is a significant factor in the formulation of a rule of immunity. *Harlow v. Fitzgerald*, ___ U.S. ___, 102 S. Ct. 2727 (1982). The Third Circuit, in *Black v. Bayer*, determined that the costs and chilling effects of proceeding even to summary judgment weighed in favor of granting absolute damage immunity to public defenders. *See also Miller v. Barilla*, 549 F.2d 648, 649-650 (9th Cir. 1977), *overruled*, *Glover v. Tower*, 700 F.2d 556, 558-559 (9th Cir. 1983).

Qualified immunity may shield the public defender from ultimate liability in some cases, but it will not protect the public defender or the courts from the greater damage incurred by the forced reallocation of scarce, fixed resources to cope with a spate of meritless claims. The mass of indigent defendants requiring quality legal representation and adequate court consideration will ultimately suffer. A rule of absolute immunity is required to protect the inter-

ests of the court, the public defender, the public, and the body of indigent defendants.

D. *Allowing indigent criminal defendants to sue their public defenders under Section 1983 creates a conflict of constitutional dimensions.*

The judicial process must insure that an indigent criminal defendant's Sixth and Fourteenth Amendment right to effective assistance of counsel is protected in a state criminal prosecution. "There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County*, 454 U.S. at 322. Public defender programs have been established as a measure for insuring that indigent criminal defendants are afforded effective legal assistance. State and local governments spent over $435 million in fiscal year 1980-1981 on indigent defense.[13]

Section 1983 suits based on alleged conspiracies in a system of indigent defense and designed to circumvent *Polk County*, present an ironic counterpoint to the historical roots of § 1983. The Ku Klux Klan Act of 1871, intended to ensure that federal constitutional rights were not violated by state officials without any accountability. Yet now a vast system of state mechanisms put in place to ensure vindication of federal constitutional rights is itself

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[13]Lefstein ABA Committee Study, *supra*, p. 27 at 10. The sum is based on figures from either fiscal years 1980 or 1981, depending on availability of data in each jurisdiction.

subject to masses of frivolous suits under § 1983. Inevitably this unimagined counterthrust reallocates the public defender's scarce resources and weakens its ability to protect the constitutional rights of those entrusted to its care.

Indeed, a conflict of constitutional dimension is created if disgruntled indigent defendants are authorized by § 1983 to bring federal actions for money damages against the public defenders who represent them. The exposure of a public defender to such lawsuits with the attendant diversion of the defender's attention, time and funding necessarily will interfere with and may well prevent the speedy and efficient performance of the defender's function. *Black v. Bayer*, 672 F.2d at 3109. Thus, one client's § 1983 lawsuit against his public defender threatens to compromise the constitutional rights of the defender's other clients to effective assistance of counsel. Congress simply could not have intended that such constitutional anomalies occur, particularly when, as discussed below, other remedies are available to indigent defendants and the public to remedy and sanction negligent or wrongful conduct by public defenders.

E. *A range of state and federal remedies other than Section 1983 protect an indigent defendant in the rare case of an actual constitutional deprivation.*

These remedies serve the policy underlying the enactment of the Civil Rights Act of 1871.

The costs to the body of indigent defendants of a grant of absolute immunity to the public defender are plainly low, if they exist at all. Empirical data discussed above has highlighted the predictably high rate of frivolous claims. Further, the cost of an immunity to be borne by the rare plaintiff with a well-founded conspiracy claim is offset by the availability of other potent means of redress.

In his complaint for damages under § 1983, Glover stated: "* * * your plaintiff's only redress is through civil action via Title 42 U.S. C. 1983." (J.A. 9). A key purpose of the Civil Rights Act of 1871 was to establish an avenue between wrongs committed under color of state law and the federal courts, *Monroe v. Pape*, 365 U.S. at 173-175. The Civil Rights Act of 1871 established the federal remedy to provide at least one salient remedy for deprivation of federally secured rights if state law or state law enforcement were inadequate to the task. *Ibid.* If, in fact, § 1983 were Glover's only remedy, a strong historical as well as policy reason would exist for hesitating to recognize an immunity that would effectively cut off his access to § 1983. The fact that Glover's claim is far from true undercuts any historical justification for countenancing his suit and demonstrates that the policies which led to the

establishment of § 1983 are being well and thoroughly served by other available state and federal remedies.

In the facially unlikely event that a public defender were to conspire with a public official to deprive an indigent defendant of his constitutional rights as alleged here, state legal systems provide extensive correctives to cure the violation. *Polk County v. Dodson*, 454 U.S. at 325 n 18. Glover had the right to direct appellate review of his conviction in the Oregon Court of Appeals. Or. Rev. Stat. § 138.040. The need to provide private damage actions to control unconstitutional conduct at a lower court level is reduced when the judicial process provides for correction of error on appeal. *Butz v. Economou*, 438 U.S. at 512; *see also Pierson v. Ray*, 386 U.S. 547, 554 (1967). Glover had the prerogative to seek discretionary review of the court of appeals decision in the Oregon Supreme Court. Or. Rev. Stat. § 2.520. Glover also could, and still can, invoke state post-conviction relief proceedings, Or. Rev. Stat. §§ 138.510 *et seq.*

Glover also had a federal habeas corpus remedy, 28 U.S.C. § 2254, to obtain review of his claim that he was victimized by his trial and appellate public defenders. *See Polk County v. Dodson*, 454 U.S. at 325 n. 18. A federal criminal statute, 18 U.S.C. §

242,[14] protects the societal interest in punishing and deterring unlawful or unethical conduct by the public defender. The statute has been applied to provide a remedy against a public defender who abuses his office and wilfully deprives a client of his constitutional rights.[15] As the court in *Imbler v. Pachtman* pointed out regarding prosecutors, a grant of immunity "does not leave the public powerless to deter misconduct or to punish that which occurs." 424 U.S. at 429. State bar disciplinary proceedings could also be instituted. *See*, 424 U.S. at 429. "These checks undermine the argument that the imposition of civil liability is the only way to insure that [public lawyers] are mindful of the constitutional rights of persons accused of crime." 424 U.S. at 429.

Even if it were the case that the type of relief rather than the nature of the wrong to be remedied were an important concern of Congress in enacting the Ku Klux Klan Act, *see Monroe v. Pape*, 365 U.S. at 183, *but see Whitman, supra*, p. 16 , at 21, Glover may have had a civil action for monetary damages in state tort law for malpractice which

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[14] 18 U.S.C. § 242 provides in pertinent part:

"Whoever, under color of any, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States * * * [is guilty of an offense.]"

[15] *United States v. Senak*, 447 F.2d 304 (7th Cir), *cert. denied*, 414 U.S. 856 (1973) (indictment of a county public defender charged with exacting fees from an indigent client and from friends and relatives of other indigent clients by threatening inadequate legal representation states an offense under 18 U.S.C. § 242).

alleviates the concern.[16]

Thus, in the improbable event that petitioner public defenders did conspire with state officials to deprive Glover of his constitutional rights, he would have avenues for redress even if his public defenders were absolutely immune from § 1983 damages liability. This factor reinforces the conclusion that public defenders should be granted absolute immunity from § 1983 damages liability. *Black v. Bayer*, 672 F.2d at 320; *see Barr v. Matteo*, 360 U.S. 564, 576 (1959).

CONCLUSION

The manifest public good of a grant of immunity from § 1983 liability for public defenders engaged in important efforts to vindicate federal constitutional rights far outweighs the effect of foreclosing one avenue of relief to claimants. The decision of the Court of Appeals, holding that public defenders have no immunity from a § 1983 suit, should be reversed. This case should be remanded with instructions that the Court of Appeals vacate its judgment and

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[16] No Oregon appellate case has discussed the liability of a public defender for damages in a malpractice action brought by a former client. Other states' courts have held that public defenders may be liable to their clients for malpractice damages. *Reese v. Danforth*, 486 Pa. 479, 406 A.2d 735 (1979); *Spring v. Constantino*, 168 Conn. 563, 362 A.2d 871 (1975); *Donigan v. Finn*, 95 Mich. App. 28, 290 N.W.2d 80 (1980).

reinstate the District Court's order and judgment dismissing Glover's complaint.

Respectfully submitted,
DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
MICHAEL D. REYNOLDS
WILLIAM F. NESSLY, JR.
ROY E. PULVERS
Assistant Attorneys General
Counsel for Petitioners

COUNTY PUBLIC DEFENDER

151.010 Public defender services by county; termination. (1) The board of county commissioners of any county may provide county public defender services by:

(a) Contract with an attorney or group of attorneys; or

(b) Creation of an office of county public defender and appointment of a county public defender as provided in ORS 151.010 to 151.090.

(2) The board of county commissioners may at any time terminate the office of the county public defender.

(3) As used in ORS 151.010 to 151.090, "board of county commissioners" includes county court. [1971 c.432 §1; 1973 c.836 §311]

151.020 Status of county public defender and staff as county employes. The county public defender, his deputies and investigators, and other employes of the county public defender shall not be subject to civil service laws or be classified as county employes for purposes of the county retirement plan, unless the board of county commissioners specifically determines by order that they shall participate in the retirement plan. [1971 c.432 §2]

151.030 Private practice by defender or deputy prohibited in certain cases. Any county public defender and any deputy county public defender receiving a salary in excess of $13,000 per year shall not engage in a private practice of law. [1971 c.432 §3]

151.040 Term; qualification; employment by prosecution prohibited. (1) The term of office of the county public defender is four years, subject to the provisions of ORS 151.010 (3), and subject to removal from office for cause by the board of county commissioners.

(2) The county public defender shall be an active member of the Oregon State Bar in good standing.

(3) The county public defender shall take an oath of office to support the Constitution of the United States and the Constitution of the State of Oregon.

(4) The county public defender and his deputies shall not be employed in any capacity by the district attorney or other public prosecutor. [1971 c.432 §4]

151.050 Defender's staff; duties; office expenses paid by county. (1) Subject to limitations otherwise prescribed by law, when it is necessary to enable the public defender to perform his duties, the county public defender may, with the approval of the board of county commissioners:

(a) Employ one or more attorneys as deputies to exercise such powers, authority and duties of the public defender as he may assign to them;

(b) Employ other individuals, including expert investigators, expert witnesses and interpreters;

(c) Hire professional staff, assistance and clerical staff; and

(d) Do all those acts necessary and proper for the faithful performance of his duties.

(2) The county shall pay all necessary and proper expenses of the office of county public defender, including wages and salaries, in accordance with the county budget laws. This in no way restricts the county from contracting with or entering into agreements with other counties or subdivisions of the state, or with the State of Oregon, or with the United States Government or its agencies for payment of these expenses by agreement or contract as provided in ORS 151.090. [1971 c.432 §5]

151.060 Appointment to represent indigents by circuit and district courts; authority for appointment by federal and municipal courts. (1) The circuit or district court of the county for which he is county public defender shall have the power to appoint the county public defender in any proceeding in which, under ORS 135.050 or otherwise, the court has the power to appoint counsel to represent an indigent. A federal or municipal court may appoint the county public defender for a proceeding before it pursuant to an agreement under ORS 151.090.

(2) The county public defender may act as an attorney for an indigent at any stage of any criminal or other proceeding before any state or federal court or magistrate before which the county public defender or his designated deputy is admitted to practice.

(3) The county public defender may act only in any county for which he is county public defender or in a county in which occurs any stage, including judicial review, of a proceeding begun in a county for which he is public defender.

(4) Nothing in ORS 151.010 to 151.090 shall limit the power of any court to appoint counsel to represent an indigent as otherwise provided by law. [1971 c.432 §6]

151.070 Gifts and grants. Any county having a public defender may accept gifts, grants, donations, requests or devises to aid and promote the work of the county public defender, and the county public defender may cooperate with nonprofit organizations and government agencies that render legal aid within the county to persons without means to retain an attorney. [1971 c.432 §7]

151.080 Register of proceedings. The office of public defender shall maintain a register in which shall be kept a memorandum of each proceeding in which the county public defender serves in his official capacity, and the right to custody of the register shall pass to the county public defender's successor. [1971 c.432 §8]

151.090 Interagency agreements relating to services of defender. The provisions of ORS 190.003 to 190.110 shall apply to the powers granted counties by ORS 151.010 to 151.090. The county commissioners of a county with a public defender may also enter into a contract or agreement with the United States Government or any agency of the United States Government for provision of services by the county public defender, and the county may accept payment from the United States Government or agency for such services pursuant to such an agreement or contract. [1971 c.432 §9]

STATE CONTRACT FOR COUNSEL TO INDIGENTS

151.150 State Court Administrator may contract for provision of counsel to indigent persons. (1) The State Court Administrator, on behalf of the state, may contract with an attorney or group of attorneys for the provision by the attorney or group of attorneys of services as counsel for indigents in proceedings in which a court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation. The State Court Administrator, on behalf of the state, and the governing body of a county having a county public defender as provided in ORS 151.010 to 151.090, on behalf of the county, may contract for the provision by the county public defender of services as counsel for indigents in those proceedings. The expense of services provided under a contract shall be paid by the state from funds available for the purpose.

(2) A court or magistrate may appoint an attorney or a county public defender under a contract with the state as provided in subsection (1) of this section to represent an indigent in any proceeding in which the court or magistrate has the power to appoint counsel to represent an indigent and the state is required to pay compensation for that representation.

(3) This section does not apply to proceedings in which the Public Defender established by ORS 151.280 is authorized, able and appointed to provide services as counsel for indigents. [1981 s.s. c.3 §117]

Note: 151.150 becomes operative January 1, 1983. See section 5, chapter 3, Oregon Laws 1981 (special session).

STATE PUBLIC DEFENDER

151.210 Definitions for ORS 151.220 to 151.280. As used in ORS 151.220 to 151.280, unless the context requires otherwise:

(1) "Committee" means the Public Defender Committee appointed under ORS 151.270.

(2) "Defender" means the Public Defender appointed under ORS 151.280. [Formerly 138.710]

151.220 Public Defender; term; qualifications; deputies. (1) The defender's term is four years, and he may be reappointed. The office of defender becomes vacant upon the conditions prescribed in ORS 236.010, upon the committee's finding of any of the causes enumerated in ORS 241.425 (1) to (3), or upon the defender's failure to comply with subsection (2) of this section.

(2) The defender shall be an active member of the Oregon State Bar.

(3) To qualify for office the individual appointed defender shall file with the Secretary of State his signed oath of office to the effect that he will support the Constitution of the United States and the Constitution of Oregon, and that he will faithfully and honestly demean himself in his office.

(4) The defender and his deputies shall be members of the exempt service established by ORS 240.200. One secretary for the defender shall be a member of the unclassified service.

(5) The defender, and any of his deputies who receive a salary of $10,000 per year or more, shall not engage in the private practice of law.

(6) The defender and his deputies shall not be employed in any capacity by a district attorney or other public prosecutor. [Formerly 138.740]

151.230 Salary and expenses. (1) The defender shall receive such annual salary as is provided by law. The defender shall receive the minimum salary unless such salary is or has been altered by the Public Defender Committee in the manner prescribed in ORS 292.855 (1975 Replacement Part).

(2) The defender shall be paid by the state in the same manner as other state officers are paid. Such salary shall be the full compensation to the defender for all his services, except for the allowance of his expense as a state officer. [Formerly 138.750]

151.240 Administrative powers of defender. (1) When it is necessary to enable the defender to perform his duties, the defender may:

(a) Employ deputies with the power and authority of the defender.

(b) Employ other individuals, including expert investigators, witnesses and interpreters.

(c) Contract for the purchase of materials or other services.

(d) Consult with and, in appropriate cases, join in the defense, any attorney who had previously represented the individual in a case which resulted in a conviction under consideration in the proceeding where the defender represents the individual. Any compensation paid such attorney for services rendered under this paragraph shall be paid solely as provided by ORS 138.490.

(e) Make or assist in making any study, survey or report upon the need for, use of and availability of legal aid to indigent persons in the State of Oregon, and accept payment therefor.

(2) Subject to the express approval of the committee, the defender may accept gifts, grants or services from, or contract with nonprofit organizations, educational institutions and other state or federal agencies; in rendering legal aid to persons without means to retain an attorney and in studying, surveying and reporting on the need, use and availability of such aid in the State of Oregon.

(3) Payment for materials and services procured under this section shall be made in the same manner as other state expenses are paid. [Formerly 138.760]

151.250 When defender may render services. (1) In accordance with subsections (2) to (4) of this section and the determinations of the committee under ORS 151.280 (2) or (7), the defender may act as attorney at any stage of a proceeding before any court, including the Supreme Court, for an individual who is committed to the legal and physical custody of the Corrections Division pursuant to ORS 137.124, and the proceeding is other than:

(a) A habeas corpus proceeding;

(b) A proceeding for which counsel is appointed under ORS 135.045, 135.050, 419.498 or 426.100; or

(c) A proceeding of contempt of court, criminal or civil.

(2) The defender may act only at the request of the individual described in subsection (1) of this section, or, if no such request is made, at the request of the court or magistrate.

(3) The individual on whose behalf the defender is requested to act shall submit to the defender, in the form prescribed by the committee, an affidavit of his financial circumstances.

(4) At the request of the defender or an individual who seeks the defender's aid, the court or magistrate before whom a proceeding is pending or to whom an application for relief has been made, shall finally determine whether the individual is eligible under this section for the defender's aid. [Formerly 138.770; 1973 c.694 §19]

151.260 Register of proceedings. The defender shall keep a register in which he shall make a note of each proceeding in which he serves in his official capacity. The right to custody of the register passes to the defender's successor in office, and the defender shall deliver the register to his successor in office. [Formerly 138.780]

151.270 Public Defender Committee; appointment; expenses; term. (1) The Supreme Court shall appoint a Public Defender Committee of not fewer than five individuals, who, in the opinion of the court, are qualified by training or experience to perform the func-

tions of the committee. A majority of the committee is a quorum for the transaction of business.

(2) Each member is entitled to compensation and expenses as provided in ORS 292.495.

(3) Each member's term is four years and he may be reappointed. [Formerly 138.720]

151.280 Duties of committee. The committee shall:

(1) Appoint a Public Defender;

(2) Determine policies and procedures for the performance of the defender's functions;

(3) Determine standards of eligibility for the defender and his deputies;

(4) Approve the original estimate sheet in connection with the budget for the defender's office and generally be responsible for supervision of the expenditures made for the defender's office;

(5) Prescribe a form of oath of financial circumstances for use under ORS 151.250 (3);

(6) Prescribe a formula of apportionment of expenses under ORS 137.205 (1969 Replacement Part); and

(7) Where the defender is unable to perform fully his authorized functions, determine the nature and extent of the services he shall render. [Formerly 138.730]

151.290 Public Defender's Account. There hereby is established in the General Fund of the State Treasury an account to be known as the Public Defender's Account. All moneys received by the Public Defender shall be paid into the State Treasury and credited to the Public Defender's Account. All moneys in the Public Defender's Account hereby are appropriated continuously for and, subject to approval by the Public Defender Committee, shall be used by the Public Defender in carrying out the purposes of ORS 138.480 to 138.500, 138.590 and 151.210 to 151.290. [Formerly 138.790]

CHAPTER 152
[Reserved for expansion]

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No. 82-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender
of Douglas County, Oregon and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioners,

v.

BILLY IRL GLOVER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT

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*RICHARD A. SLOTTEE
CRAIG K. EDWARDS
1018 Board of Trade Bldg.
310 S.W. Fourth Avenue
Portland, Oregon 97204
Telephone: (503) 222-6429
Counsel for Respondent

**Counsel of Record*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a public defender who conspired with state officials to deprive his client of fundamental constitutional rights is absolutely immune from liability under 42 U.S.C. § 1983.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions and statutes set out by the petitioners, the resolution of the issue in this case involves 18 U.S.C. § 242 and 28 U.S.C. § 1915 (d).

18 U.S.C. § 242 provides in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

28 U.S.C. § 1915 (d) provides in pertinent part:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous.

STATEMENT OF THE CASE

Petitioners Tower, a county public defender, and Babcock, a state public defender, knowingly and deliberately conspired with state officials to deprive Billy Irl Glover of a fair trial and appeal. (J.A. 9, 10). Tower failed to obtain necessary documents from state agencies that would have enabled him to prepare a proper defense for Glover in his criminal trial. (J.A. 7). Tower conspired with state officials so that he did not obtain the documents necessary for Glover's defense at trial. (J.A. 5, 6)

Following his conviction, Glover requested that petitioner Babcock, the state public defender, address certain essential issues on appeal. (J.A. 8). Babcock instead conspired with state officials to cover up the earlier agreements with Tower, (J.A. 9), and as a result filed an appellate brief that was incomplete, inadequate and in error (J.A. 8). The conspiracy involved the trial court judges, (J.A. 5), and appellate judge Johnson, the Oregon attorney general at the time of Glover's conviction who later placed himself on the panel that heard Glover's appeal. (J.A. 9, 43). Believing that no state court would call to task the conspirators who had knowingly and deliberately deprived him of his liberty, Glover sought redress through an action filed under 42 U.S.C. § 1983. (J.A. 9, 10)

SUMMARY OF THE ARGUMENT

Public defenders who conspire with state officials to deprive a client of his fundamental constitutional rights should not be immune from liability under 42 U.S.C. § 1983. A judicial grant of absolute immunity for public defenders is not supported by the language or legislative history of § 1983. Congress intended the statute to be broadly construed in order to provide a federal avenue of redress for the deprivation of constitutional rights. Public defenders who conspire with public officials to deprive their clients of constitutional rights commit the very type of wrong that Congress sought to remedy in the enactment of § 1983.

This Court has never accorded any person immunity from suit under § 1983 when that person did not have a comparable grant of immunity at common law. The common law does not support a grant of absolute immunity for public defenders because they are functionally equivalent to private defense counsel, who had no immunity at

common law except for defamatory remarks at trial. All defense counsel effectively retain their common law defamation immunity under § 1983, because a lawyer's traditional functions as counsel to a defendant are not performed under "color of law" for the purposes of § 1983, and thus are not subject to suit. The petitioners have failed to justify any expansion of the immunity already given defense counsel under § 1983.

Public defenders, like court appointed counsel, do not perform a quasi-judicial function in the judicial process. Their primary, if not their only, responsibility is to represent an individual client's interests. This function is in direct contrast to the broader public responsibilities performed by a government official such as a prosecutor or judge. A public defender does not exercise quasi-judicial judgments on the basis of evidence presented as do judges, prosecutors, grand juries, and parole boards, so a grant of quasi-judicial immunity is improper. Further, a public defender's conspiratorial agreement with a state official is beyond the scope of traditional defense functions, and should not be protected. All persons granted immunity by this Court are protected only for acts performed within the scope of their professional duties. Because a prosecutor is given immunity protection only for acts within the prosecutorial function, public defenders should be similarly limited in their protection from suit under § 1983 to acts within the defense function.

Public defenders should not be given a qualified immunity under § 1983 because they are not governmental officials and did not enjoy a qualified immunity at common law. Public defenders do not exercise their discretion in the public interest, so the importance of a federal damages remedy that protects the rights of individual citizens rises to a level of paramount importance. The public

policy and historical considerations for granting qualified immunity simply do not apply to this case.

Public defender immunity would inevitably result in a denial of equal protection for some indigent criminal defendants under the present Oregon statutory scheme. Under current Oregon law, some indigent defendants are represented by court-appointed counsel in counties that do not have public defender systems. These defendants have a potential avenue of redress under § 1983 against their court-appointed attorney. Indigents represented by public defenders in counties with public defender systems could not bring suit against their defense counsel under § 1983 if public defenders gain absolute immunity. A grant of absolute immunity would result in the arbitrary denial of equal access to a federal remedy under Oregon law.

Public policy mandates that public defenders should be subject to § 1983 liability. Alternate avenues to redress constitutional violations are inadequate because Congress intended § 1983 to supplement state remedies. Criminal actions cannot be instituted by the individual, habeas corpus proceedings fail to compensate one deprived of constitutional rights, and state malpractice actions may be thwarted by a state provided immunity defense. Deprivations of constitutional rights are more serious than violations of state rights, and therefore deserve a federal remedy.

Empirical evidence does not indicate that public defender liability under § 1983 will overburden the criminal justice system. Available evidence indicates that conditions of confinement, rather than a prisoner's dissatisfaction with representation, provides the basis for most § 1983 suits. Further, few § 1983 suits proceed beyond the pleading stage due to the difficulties of stating a

sufficient claim. Statistics demonstrate that defenders actually devote little time to the defense of § 1983 suits. Moreover, defenders are usually covered by malpractice insurance, or as this case exemplifies, can obtain legal representation through the state attorney general. All of petitioners' policy arguments are speculative, and unsupported by empirical evidence. Public policy considerations defy a grant of public defender immunity when it will result in an unjustifiable erosion of fundamental constitutional rights.

ARGUMENT

I. Glover Stated A Sufficient Claim For Relief Under 42 U.S.C. § 1983.

Section 1 of the Civil Rights Act of 1871 provides a federal remedy in money damages against "every person who, under color of any statute . . . of any state . . ., subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution." 42 U.S.C. § 1983 (1976). The text of § 1983 articulates a two part jurisdictional requirement: the aggrieved party must have suffered (1) the deprivation of a constitutional right, (2) by a person or persons acting "under color of law." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Billy Glover alleged the requisite jurisdictional elements of § 1983 in his claim for relief against petitioners Tower and Babcock. Glover alleged that petitioners deprived him of his sixth amendment right to counsel and fourteenth amendment right to due process through a conspiracy with state agents, Glover's trial judges, the state Attorney General, and a certain judge of the Oregon Court of Appeals.[1] The named officials, as agents of the

[1] Glover's complaint alleged that his public defender at trial, petitioner Tower, conspired to prevent him from obtaining records held

state, clearly meet the necessary "color of law" jurisdictional requirement that is also imputed to petitioners by virtue of their participation in the conspiracy. *See Dennis* v. *Sparks*, 449 U.S. 24, 27-28 (1980).

Judicial immunity does not operate as a jurisdictional bar to the institution of a § 1983 suit against persons who conspired with the judge, nor can the co-conspirators derive immunity from the state officials with whom they conspired. 449 U.S. at 31-32. Glover's trial and appellate judges' immunity cannot therefore bar Glover's properly stated § 1983 claim against petitioners Tower and Babcock.

II. Congress Intended That § 1983 Be Liberally Construed To Provide A Broad Federal Remedy For The Deprivation Of Fundamental Constitutional Rights. The Statute's Remedial Purpose And Scope Defy The Creation Of An Immunity Defense For Public Defenders.

It is well-settled that § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). The statute's language is absolute and unqualified, with no mention made of any privileges, immunities or defenses that may be asserted. *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 635 (1980). This Court has recognized, however, that the tort liability created by § 1983 cannot be read in a historical vacuum, but that it must be construed in light of legislative history and applicable common law principles. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 246, 258 (1981).

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by state agencies that were necessary for Glover's defense. (J.A. 5, 6). Glover further alleged that his appellate public defender, petitioner Babcock, conspired with state agents to cover up the prior agreements with Tower, (J.A. 9), and to present an inadequate appellate brief. (J.A. 8).

Legislative history shows that Congress enacted § 1 of the Civil Rights Act of 1871 to provide a liberal and independent federal remedy for persons who had been deprived, under color of law, of rights guaranteed by the United States Constitution through the fourteenth amendment. *Briscoe* v. *LaHue*, ___ U.S. ___, 103 S.Ct. 1108, 1117 (1983). The congressional sponsor of § 1983 emphasized the statute's remedial purpose:

> [This] act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. . . . [A]s has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871).

While Congress intended primarily to rectify the unwillingness of state officials to enforce state laws against the Ku Klux Klan, *Monroe* v. *Pape*, 365 U.S. 167, 201 (1961) (Harlan, J., concurring), the tone of the congressional debates was in general "surely one of overflowing protection of constitutional rights." *Id.* at 196. The sweeping language of the statute and the legislative history indicate that Congress intended § 1983 to be broadly construed in order to adequately redress injuries of constitutional proportions. *Id.* at 201. Congress did not close its eyes to unjust convictions which result from conspiratorial agreements by excluding these wrongs from the broad reach of the statute. Contrary to petitioners' stilted interpretations, a deprivation of constitutional rights that results from a conspiracy between state offi-

cials and private persons to cause an unjust conviction is of the same constitutional import as the deprivation of rights caused by the unwillingness of state courts and prosecutors to seek and impose criminal punishment.

Congress did not intend to simply federalize state tort law in enacting § 1983, but instead sought to "give a broad remedy for violations of federally protected civil rights." *Monell* v. *Department of Social Services*, 436 U.S. 658, 685 (1978). "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy." *Monroe*, 365 U.S. at 196 (Harlan, J., concurring). This Court should not extend a new grant of absolute immunity under § 1983 "in the absence of the most convincing showing that the immunity is necessary." *Imbler*, 424 U.S. at 434 (White, J., concurring.) Because the statute is remedial, this Court should not abrogate the scope of protection Congress sought to provide. Where constitutional rights are at stake, courts should properly construe statutes to avoid the conclusion that Congress intended to use the privilege of immunity so as to defeat the statutory purpose. Bator, Mishkin, Shapiro, and Wechsler, *Hart and Wechsler's The Federal Court and the Federal System* 336 (2d ed. 1973). Public defender immunity would severely erode the guarantee of constitutional rights that Congress sought to protect through § 1983.

III. Common Law Principles Do Not Support A Judicial Grant Of Immunity For Public Defenders.

A. Public defenders are functionally equivalent to private defense counsel, so an immunity defense is improper.

The burden of establishing the right to an immunity defense is on the official claiming its entitlement. *Dennis*, 449 U.S. at 29. When a defendant in a § 1983 suit asserts

an immunity defense, this Court recognizes it only if the common law historically accorded that person immunity from suit. *Imbler*, 424 U.S. at 421. *Tenney* v. *Brandhove*, 341 U.S. 367, 376-377 (1951).

The concept of publicly appointed and subsidized representation for indigent criminal defendants did not exist at common law. *Robinson* v. *Bergstrom*, 579 F.2d 401, 409 (7th Cir. 1978); *Minns* v. *Paul*, 542 F.2d 901 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); *Betts* v. *Brady*, 316 U.S. 455, 466 (1942). Public defender programs were largely created after 1963, in response to the due process requirements established by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and its progeny.[2] The void created by a paucity of common law history, however, may be remedied by comparing the function of the position at issue with that of a similar position which had immunity at common law. *Imbler*, 424 U.S. at 422-423.

This Court has affirmatively stated that "the primary office performed by appointed counsel parallels the office of privately retained counsel." *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979). Thus, the court appointed attorney is no more a public official than his private counterpart.

> Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. *His principal responsibility is to serve the undivided interests of his client.* Indeed, an indispensable element of the effective performance of his responsibili-

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[2] At least one state, however, has had court-appointed attorneys for indigent criminal defendants since 1892. *See Spring* v. *Constantino*, 362 A.2d 871, 874 n.2 (Conn. 1975).

> ties is the ability to *act independently of the government* and to oppose it in adversary litigation." 444 U.S. at 204 (emphasis added).

From the moment that a public defender is appointed, he assumes a relationship with the accused that is identical to that existing between any other defense lawyer and client. *Polk County* v. *Dodson*, 454 U.S. 312, 318. The public defender serves a private function, so governmental immunity is inappropriate.

In *Ferri*, this Court held that a court appointed attorney does not have immunity under federal law from a state malpractice action. *Id.* at 205. Although the attorney had been appointed under the Criminal Justice Act and paid by the government, the Court noted that "countless private citizens are the recipients of federal funds of one kind or another, but Congress surely did not intend that all such recipients would be immune for actions taken in the course of expending those funds." *Id.* at 201. A public defender system's source of operational funds, whether federal, state or county, does not therefore justify a new grant of immunity.

In *Polk County*, *supra*, the respondent argued that even if the "function" of a public defender is not distinct from that of a private lawyer, the public defender's "status" is materially different from that of the private defense attorney. 454 U.S. at 320-321. This argument was rejected in favor of the view that a public defender's "status" is insufficient to establish that a public defender acts under "color of state law." 454 U.S. at 321. Defense of the criminally accused is essentially a *private function*—whether filled by retained counsel, appointed counsel, or a public defender. *Id.* at 318-319. The same reasons that prompted this Court to state that public defenders do not act "under color of law" also dictate that defenders do not

warrant the cloak of governmental immunity. Since public defenders perform precisely the same function as court appointed and private defense counsel, public defenders should only obtain the limited immunity that is afforded private defense counsel.

1. Defense attorneys do not have immunity at common law except for defamatory remarks made at trial. Public defenders should have the same limited immunity under § 1983.

Privately retained attorneys did not have blanket immunity from all liability at common law. They were subject to malpractice actions based upon prior civil and criminal proceedings. *See Branson* v. *Oregon Railroad*, 10 Or. 278, 295 (1881); *Malone* v. *Sherman*, 49 N.Y. Sup. Ct. 530 (1883). Several states currently deny immunity for public defenders in malpractice actions. *Spring* v. *Constantino*, 362 A.2d 871, 879 (Conn. 1975); *Reese* v. *Danforth*, 406 A.2d 735 (Pa. 1979); *Donigan* v. *Finn*, 290 N.W.2d 80 (Mich. 1980).

Numerous federal courts have also reached the conclusion that the common law accords no immunity to public defenders sued by clients for malpractice. *See White* v. *Bloom*, 621 F.2d 276 (8th Cir. 1980); *Robinson* v. *Bergstrom*, 579 F.2d at 411; *Tasby* v. *Peek*, 396 F. Supp. 952, 958 (W.D. Ark. 1975); *Louisiana* v. *Crolino*, 393 F. Supp. 1362, 1364 (D. Nev. 1974); *Hill* v. *Lewis*, 361 F. Supp. 813, 818 (E.D. Ark. 1973); *United States* v. *Blacker*, 335 F. Supp. 43, 46 (D.C.N.J. 1971); *Vance* v. *Robinson*, 292 F. Supp. 786, 788 (W.D.N.C. 1968).

The common law provided counsel with a minimal shield of immunity in that defamatory statements made during judicial proceedings were privileged only if the remarks were relevant to the subject matter at issue. *Imbler*, 424 U.S. at 426 n.23. Prosecutor and defense

counsel were given latitude solely for the examination of witnesses and for commentary upon witness testimony and demeanor under oath. Veeder, *Absolute Immunity in Defamation; Judicial Proceedings*, 9 Colum. L. Rev. 463, 482 (1909). Courts granted trial counsel immunity from defamation suits as a means to promote the free and unfettered administration of justice. *Id.* at 482.

This Court need not extend immunity to all acts within and without the defense function in order to preserve the policies that underlie defamation immunity. A public defender's defamation immunity is effectively preserved under § 1983 by virtue of the color of law pleading requirement. Under *Polk County*, *supra*, the acts performed during traditional defense functions (including defamatory remarks) are not exercised under "color of law," and thus are not subject to § 1983 lawsuits. 454 U.S. at 324.

In *Owen* v. *City of Independence*, 445 U.S. at 638, this Court explained that all common law immunities are not automatically incorporated into § 1983:

> [T]he Court's willingness to recognize certain traditional immunities as affirmative defenses has not led it to conclude that Congress incorporated all immunities existing at common law. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 243, 94 S.Ct. 1683, 1690, 40 L.Ed 2d 90 (1974). Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983. *See Imbler* v. *Pachtman*, 424 U.S. at 424.

Because defense counsel had limited immunity at common law, this Court should not now further expand the immunity provided by § 1983. Common law defamation

immunity does not support boundless immunity for public defenders when "performing their role in the judicial process" as petitioners assert. (Petitioners' brief at 20). Petitioners have not justified any expansion of the immunity which was incorporated into the statute by Congress. Public defenders should be liable for conspiratorial acts which deprive their clients of constitutionally protected rights.

B. Public defender immunity is improper because defenders exercise a private function, not a quasi-judicial function.

Judicial immunity exists because judges, in whom discretion is entrusted, must be able to exercise vigorous and impartial discretion on behalf of the public without apprehension of subsequent burdensome litigation. *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). Courts have sparingly accorded § 1983 immunity to other participants in the judicial process. Too broad a swath of protection from suit would judicially repeal the congressional mandate that "every person acting under color of law" is subject to suit for actions which deprive others of constitutional rights. *See City of Newport*, 453 U.S. at 259. Absolute immunity is therefore extended only to those other participants in the judicial process who exercise a "quasi-judicial" decision making function similar to that of the judge, such as prosecutors,[3] grand jurors,[4] petit jurors,[5] and parole board members.[6] The dispositive attribute is therefore not a formal association with the judicial proc-

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[3] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

[4] *Id.*

[5] *Butz* v. *Economou*, 438 U.S. 478, 509 (1978) (dictum).

[6] *Silver* v. *Dickson*, 403 F.2d 642 (9th Cir. 1968).

ess, but rather the actor's exercise of a quasi-judicial function.

When one involved in the judicial process does not exercise a judicial or quasi-judicial function, he has no immunity, despite the person's integral relationship with the judicial system. Court stenographers,[7] jailers,[8] and court clerks,[9] do not serve a quasi-judicial function in the judicial process, and therefore do not have immunity founded on federal interests. Court appointed counsel do not have federal immunity from state malpractice suits because they serve a private, not a quasi-judicial function in the judicial process. *Ferri*, 444 U.S. at 202-204. Public defenders, like court appointed attorneys, also perform a purely private function, and thus should not be given quasi-judicial immunity from § 1983 lawsuits.

The prosecutor and the public defender perform functions so different in nature that any attempt to functionally compare the two is suspect. Contrary to petitioners' assertions that a public defender performs "equivalent judgmental functions" to that of a prosecutor (petitioners' brief at 23-24), defender judgments relate only to an individual client's case, as opposed to the purely *public* nature of prosecutorial judgments. This Court has emphasized that "the primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state." *Branti* v. *Finkel*, 445 U.S. 507, 519 (1980). "This [function] is in contrast to

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[7] *Washington* v. *Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966).

[8] *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

[9] *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972).

the broader public responsibilities of an official such as a prosecutor." *Id.* at 519 n.13.

A public defender's investigatory decisions and allocation of fiscal resources relate only to individual client interests, not the public interest. The resource allocation decisions made by a prosecutor, in contrast, represent the interests of the public constituency as a whole. Policy decisions made by a public defender "must relate to the needs of individual clients." 445 U.S. at 519. Thus, the "special nature" of public defender responsibilities (petitioners' brief at 23) do not compare at all to the public nature of a prosecutor's responsibilities.

A prosecutor's immunity for malicious prosecution is based on decisions similar to those made by a grand jury as to whether a particular prosecution should be instituted or followed up. *See Yaselli* v. *Goff*, 275 U.S. 503 (1927). The decision to prosecute is quasi-judicial because the prosecutor must exercise a discretionary judgment on the basis of evidence presented. *Imbler*, 424 U.S. at 423 n.20. Public defenders, however, are not authorized to initiate or terminate a case, nor do they decide the guilt or innocence of their clients. A functional comparison between public defender and prosecutor disproves petitioners' theory of defender immunity.

The witness is the only participant in the judicial process who possessed immunity at common law despite having no judicial or quasi-judicial decision making authority. *See Briscoe* v. *LaHue*, ___ U.S. ___, 103 S.Ct. 1108 (1983). Public policy mandates witness immunity so that testimony at trial may be free of distortions that can potentially result from the fear of subsequent civil liability. *Id.* at 1114. These public policy concerns do not provide a persuasive basis for extending immunity to public defenders. Therefore, because the public defender does

not perform a quasi-judicial function, a grant of immunity is improper.

C. When a public defender conspires with a government official to deprive his client of constitutional rights, he acts outside the scope of his professional duties. Immunity should not be accorded to acts that are outside the scope of professional duties.

Never has a grant of immunity been extended to persons acting outside the scope of their professional duties. *See Stump* v. *Sparkman*, 435 U.S. 349, *reh'g denied*, 436 U.S. 951 (1978). A public defender's conspiracy with a judge or other public official is not within the ambit of traditional defense functions, so a policy that mandates defender liability under § 1983 is proper.

A prosecutor is absolutely immune only for acts taken within the prosecutorial function, which includes the initiation of a prosecution and the presentation of the state's case. *Imbler*, 424 U.S. at 430-431. The *Imbler* Court expressly reserved the issue whether a prosecutor has absolute immunity when he acts as an administrator or investigative officer, but the courts of appeals generally have ruled that prosecutors do not enjoy immunity for the performance of these tasks. See *Mancini* v. *Lester*, 630 F.2d 990, 992 (3d Cir. 1980); *Coleman* v. *Turpen*, 697 F.2d 1341, 1346 (10th Cir. 1982); *Beard* v. *Udall*, 648 F.2d 1264, 1271 (9th Cir. 1981); *Hampton* v. *City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973); *cert. denied*, 415 U.S. 917 (1974) (prosecutor's immunity ceases when he acts in a capacity other than his quasi-judicial role); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Similarly, judges enjoy absolute immunity only for those acts performed within the scope of their judicial capacity and concurrent subject matter jurisdiction. *Stump* v. *Sparkman*, 435 U.S. at 355-357, 361.

Public officials are given immunity solely for the benefit of the public whose interest it is that those officials should be at liberty to exercise their proper public functions with independence and without fear of consequences. *See Pierson*, 386 U.S. at 554. The conspiratorial actions that petitioners now assert should be cloaked with immunity are not equivalent to the public functions that this Court has determined need protection. Section 1983 liability for conspiratorial actions will not affect a public defender's ability to exercise primary lawyering functions with independence and without fear of reprisal. The conspiracy requirement limits the number of triable suits to those that are predicated upon acts outside the scope of a public defender's authorized lawyering functions. This Court should not extend public defender immunity beyond the bounds already recognized by Congress in the enactment of § 1983.

D. Public defenders are not governmental officials so they are not entitled to qualified immunity.

Petitioners correctly argue that public defenders should not be given qualified immunity, but arrive at this upon faulty reasoning. The availability of an immunity defense is derived from an analysis of the functions and responsibilities of the actor *in his capacity as a state official* in light of the purposes of § 1983. *Scheuer*, 416 U.S. at 242-243.[10] A finding of qualified immunity, like a

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[10] This Court has accorded immunity to the following various government officials under § 1983 and claims brought directly under the Constitution: state legislators (absolute immunity) *Tenny* v. *Brandhove*, 341 U.S. 367 (1951); federal executive officials (qualified immunity) *Butz* v. *Economou*, 438 U.S. 478 (1978); state prison officials (qualified immunity) *Procunier* v. *Navarette*, 434 U.S. 555 (1978); congressional aides (absolute immunity) *Gravel* v. *United States*, 408 U.S. 606 (1972); state governors university presidents

finding of absolute immunity, is usually preceded by an inquiry into whether the actor enjoyed immunity at common law. *Dodson* v. *Polk County*, 628 F.2d 1104, 1107 (1980), *rev'd on other grounds*, *Polk County* v. *Dodson*, *supra*. The common law qualified immunity standard defies inclusion of public defenders because they are not, as this Court has repeatedly recognized, "public officials." *See Ferri*, 444 U.S. 193. The inquiry then shifts to determine whether public defenders should enjoy qualified immunity as a matter of public policy.

The recognition of a qualified immunity defense for public officials reflects "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.' " *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807, *quoting Butz* v. *Economou*, 438 U.S. at 504-506. Because public defenders are not officials who represent the public interest in an exercise of official authority, the second prong of the *Harlow* balancing test is moot. The protection of citizen rights through the § 1983 damages remedy therefore is paramount over any other policy considerations. As a matter of public policy, defenders should not have a qualified immunity from their already limited exposure to § 1983 liability.

(qualified immunity) *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); President United States (absolute immunity) *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); police officers (qualified immunity) *Pierson* v. *Ray*, *supra*; state hospital superintendents (qualified immunity) *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); school board members (qualified immunity) *Wood* v. *Strickland*, 420 U.S. 308 (1975).

IV. Public Defender Immunity Would Result In The Deprivation Of Equal Protection Under Oregon Law For Similarly Situated Indigent Criminal Defendants.

Public defender immunity under § 1983 will inevitably result in a denial of equal protection for certain indigent defendants in Oregon. Under O.R.S. 151.010 and O.R.S. 151.150 Oregon district and circuit court judges are empowered to appoint either a private defense attorney or a public defender to represent indigent criminal defendants. Petitioners' brief at App. 1-2. Courts therefore appoint only private defense counsel to represent indigents in the twenty-eight Oregon counties which do not have public defender systems. Those defendants who receive private representation under authority of Oregon law have a potential avenue of redress under § 1983. An indigent represented by a public defender under the same laws, however, will be precluded from bringing suit under § 1983 if defenders have immunity. Thus, similarly situated indigent criminal defendants will be deprived of equal protection under Oregon laws.

This Court has recognized that poverty cannot be the sole reason for the denial of access to a judicial proceeding, because such arbitrary state procedures violate the Due Process Clause of the fourteenth amendment. *Boddie* v. *Connecticut*, 401 U.S. 371, 376, 383 (1971). Also, once the right to appeal has been accorded by statute it "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey* v. *Normett*, 405 U.S. 56, 77 (1972). The Equal Protection Clause will potentially be violated under Oregon law because the § 1983 claims of indigents represented by public defenders will be barred by immunity, but the § 1983 claims of indigents represented by court appointed counsel will proceed without hindrance. Whether an indigent person is represented by

court appointed counsel or by a public defender in Oregon depends solely upon the statutory scheme and the luck of the draw. The arbitrariness of such a system is obvious. This Court should not grant immunity to public defenders under § 1983 when it will result in a denial of equal access to the courts for certain indigent criminal defendants.

The Oregon statutory scheme may also cause indigent defendants to receive ineffective assistance of counsel. The right to assistance of counsel at a criminal trial is essential to a system of equal justice, but the right to counsel is valueless if it does not mean the right to effective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970); *see Powell* v. *Alabama* 287 U.S. 45 (1932).

Immunity from § 1983 liability effectively reduces an attorney's accountability to his client. An attorney without full accountability will not likely perform his duties with due care. The American Bar Association recognized this fact long ago when it prohibited any attorney from entering into a contractual agreement with his client "to exonerate himself from or limit his liability to his client for his personal malpractice." Model Code of Professional Responsibility DR 6-102(a).

Public defender immunity would cause a potential denial of the sixth amendment right to effective assistance of counsel for those indigents who are represented by public defenders under Oregon law. Indigents similarly situated may receive differing qualitative levels of legal representation as a result of the joint operation of federal public defender immunity and Oregon criminal defense laws. Section 1983 provides indigents the sole means of vindicating constitutional rights. One indigent should not be precluded from obtaining money damages for the deprivation of fundamental constitutional rights when

another, similarly situated, has open access to remedies under the same statute. Public defender immunity under § 1983 is therefore unwarranted and constitutionally suspect.

V. Public Policy Considerations Mandate That Public Defenders Should Be Subject To § 1983 Liability.

A. Alternate state remedies do not adequately redress the violation of fundamental constitutional rights.

Petitioners argue that an indigent client may use alternate remedies to redress constitutional violations. These alternatives are inadequate because Congress enacted § 1983 to *supplement* state remedies. *Monroe* v. *Pape*, 365 U.S. at 167. Further, a plaintiff need not first exhaust state remedies before bringing a federal action under § 1983. *Id.* In *Monroe*, this Court stated that persons must have access to a neutral federal forum in order to litigate federal rights because, "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. at 180.

Only the federal govenment can bring criminal charges against a public defender under 18 U.S.C. § 242 (1976), the criminal analog of § 1983. An indigent cannot institute such action, and the § 242 proceeding does nothing to redress the indigent's constitutional injuries. Professional sanctions have little practical effect. "Unfortunately, the bar associations, like most professional societies, have shown themselves unable or at least unwilling, to police their own members." *Bazelon, The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 17 (1973). Moreover, professional disciplinary action gives no remedy to the indigent.

Federal and state habeas corpus proceedings only remedy a loss of liberty and fail to compensate a citizen who has suffered a violation of other civil rights. A malpractice suit generally poses a false hope for the indigent who cannot afford to retain private counsel in the first place. Even if the second attorney can be retained on contingency, a malpractice suit may still be thwarted by tort immunity for public defenders under state law. *See Walker* v. *Kruse*, 484 F.2d 802 (7th Cir. 1973) (dicta); *Polk County* v. *Dodson*, 454 U.S. at 453.

The remedies that petitioners recommend have limited impact. Some are designed only to gain a prisoner release from custody, while others only punish the errant defender. None give monetary compensation to the wronged indigent defendant. None of the proposed remedies afford the type of relief mandated by Congress under § 1983. As Justice Harlan admonished, "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy." *Monroe*, 365 U.S. at 196 (Harlan, J., concurring). Public defender immunity would cripple the broad remedy that Congress intended § 1983 to provide for violations of federally protected civil rights.

B. Public defender liability under § 1983 will not overburden the criminal justice system.

Public defender liability under § 1983 will not result in "a wide range of frivolous § 1983 suits which will consume the time and energy of an already overburdened criminal justice system." (quoting petitioners' brief at 26). While the total number of prisoner-filed civil rights suits may have increased over the past ten years, petitioners are merely speculating that a significant number have been filed against public defenders or court appointed attor-

neys. Statistics do not specify the percentage of prisoner suits which named former defense attorneys as defendants, nor the number of suits alleging a conspiracy. Statistics also do not foreshadow a new surge of § 1983 suits if immunity is denied.

It is true that accurate statistics regarding § 1983 litigation are difficult to obtain.[11] Published studies, however, indicate that prisoner civil rights suits filed against former defense attorneys do not burden the federal courts. One study, which focused on the United States District Court for the Central District of California, revealed that of the 125 prisoner civil rights cases filed in 1975, only seven claims alleged problems of legal representation. Eisenberg, *Section 1983: Doctrinal Foundations and An Empirical Study*, 67 Cornell L. Rev. 482, 535 n.237, 555 (1982). Only five of the 87 cases filed in the same district during 1976 dealt with prior legal representation. *Id.* Most § 1983 claims during both years involved prison conditions. *Id.* at 538.

A study which focused on five federal districts found that almost 80% of prisoner civil rights suits filed in 1975, 1976 and the first six months of 1977 dealt with claims relating to conditions of confinement. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 623 (1979).[12] Other claims in the same study primarily alleged "parole denial

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[11] The basic source regarding the number and types of suits filed in federal court each year is the Administrative Office of the United States, Annual Report of the Director. While the Annual Report records the number of civil rights suits filed against attorneys, including public defenders, prisoner lawsuits are not categorized more specifically than "prisoner civil rights."

[12] It is hardly surprising that the majority of prisoner civil rights cases concern conditions of confinement. "What for a private citizen

or revocation, detainers, sentence computation, improper arrest or police misconduct, prosecutorial misconduct, erroneous conviction or unfair trial, and problems with court personnel." *Id.* Prisoner claims directed against court-appointed attorneys or public defenders evidently lacked sufficient frequency and significance to merit specific mention in the Turner study.

Statistics which reflect the number of suits filed paint a distorted picture because most § 1983 claims never reach the trial stage. The 1976 Eisenberg study showed that of the 125 § 1983 cases filed in 1975, only three went to trial. None of the 87 prisoner civil rights cases filed in 1976 went to trial. Eisenberg, *supra*, 67 Cornell L. Rev. at 554. In fact, almost 97% of all prisoner-initiated § 1983 cases terminated in federal court in 1979 were dismissed at the pleading stage or otherwise concluded prior to trial. Prisoner Civil Rights Committee, Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts* 10 (1980) (hereinafter "Aldisert Report"). The Turner study yielded similar findings.[13]

That few § 1983 suits proceed beyond the pleading stage is hardly surprising. Many plaintiffs are unedu-

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would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the state." *Preiser* v. *Rodriquez*, 411 U.S. 475, 492 (1973). Every such dispute can be filed under § 1983.

[13] Turner found that a high proportion of prisoner cases are disposed of at the pleading stage. In the Eastern District of California, 80.4% of the cases filed in 1976 were terminated by the court. In the same year, the District of Massachusetts tried no prisoner claims and the Northern District of California and the District of Vermont tried only one prisoner case. Nationally, only 268 or 4.2% of all prisoner cases went to trial. *Turner*, *supra*, 92 Harv. L. Rev. at 617-618.

cated, without funds, possibly incarcerated, and unfamiliar with the civil machinery of the legal system. Mallen, *The Court Appointed Lawyer and Legal Malpractice-Liability Immunity*, 14 Am. Crim. L. Rev. 59, 69 (1976). Moreover, the majority of prisoner civil rights cases are dismissed *sua sponte* under authority of 28 U.S.C. § 1915(d) (1976) when a court determines that the action is "frivolous or malicious." *See* Aldisert Report, *supra*, at 59-63. The Turner study found that 68% of all prisoner cases filed nationwide in 1978 were terminated by the court without any response from the defendant. Turner, *supra*, 92 Harv. L. Rev. at 617-618. Furthermore, local rules may authorize the dismissal of a claim when the party fails to proceed with diligence. Local rule 260-3, United States District Court, District of Oregon.

Section § 1983 pleading hurdles are now higher than ever. A plaintiff must adequately allege a deprivation of constitutional rights "under color of law." While it is true that a *pro se* complaint must be liberally construed, *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972), it must nevertheless state a sufficient claim. Conclusory allegations without supporting facts are subject to immediate dismissal. *See Sooner Products Co.* v. *McBride*, 708 F.2d 510, 512 (9th Cir. 1982). The practicalities of pleading thus act to further confine a defender's potential exposure to § 1983 litigation.

Presumably, the "flood of litigation" that petitioners anticipate would have occurred prior to this Court's decision in *Polk County* v. *Dodson*, where a defender's potential liability under § 1983 was severely curtailed. Following *Polk County*, a public defender is subject to § 1983 liability only when he deprives another of Constitutional rights through a conspiracy with a public official, because a lawyer's traditional functions as counsel to a defendant are not performed under "color of law." 454 U.S. at 325.

The dreaded "flood of litigation" is mere puffery. The solution to heavy federal caseloads is not the reduction of constitutional remedies.

> As long as attention focuses on whether there are too many section 1983 cases, one need not focus on the larger question on what the law of constitutional remedy should be. Even if there are 'too many' section 1983 cases, we would have to decide whether the attendant problems are tolerable in light of the protections afforded constitutional rights. The numbers game provides a convenient distraction from the underlying issues. Eisenberg, *supra*, 67 Cornell L. Rev. at 549.

Statistics do not warrant a grant of public defender immunity when it will erode the constitutional protections offered by a federal forum.

C. Public defenders are not required to reallocate resources in order to defend prisoner initiated § 1983 suits.

While it is axiomatic that the time spent by public defenders for the defense of civil suits brought by former clients will reduce their time available for criminal defense, empirical evidence demonstrates that defenders actually devote little time to the defense of § 1983 suits. Claims against defense counsel are comparatively insignificant to other § 1983 claims, and the few cases that do survive dismissal are collectively insubstantial so as to require defenders to reallocate temporal resources.

Cost figures for the defense of prisoner § 1983 suits are not available. Most public defenders should be covered by malpractice insurance, so defender systems suffer a minimal financial burden.[14] In addition, as this case ex-

[14] Public defender programs have access to low cost professional liability insurance through membership in the National Legal Aid

emplifies, public defenders can obtain legal representation through the state Attorney General. It is the legislature's role to provide additional funding for the programs they create. Fundamental constitutional rights should not be prematurely and needlessly curtailed upon the basis of petitioners' speculative and exaggerated claims.

D. The recruitment and retention of public defenders will not suffer as a result of § 1983 liability.

Public defender quality and quantity will not be adversely affected if defenders are not given immunity from § 1983 actions. Some courts have accorded grants of public defender immunity based upon such speculation, *Black* v. *Bayer*, 672 F.2d 309, 319 (1982), but these speculative consequences are unsupported by empirical evidence. *See Ferri*, 444 U.S. at 204-205.

Survey results in California demonstrated that "apparently, the reality of malpractice has not occurred to most public defenders and very few plans have been made for such a contingency." Mallen, *supra*, 14 Am. Crim. L. Rev. at 70. All lawyers face the possibility of defending a malpractice claim, frivolous or otherwise, but this drawback has not reduced the number of attorneys seeking employment.[15] Statistics show that private counsel are

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and Defender Association. NLADA, *Thou Shalt Not Ration Justice*, 17 (Dec. 1982) (circular distributed to new members).

[15] Between 1,575 and 2,000 full-time counsel would be required to represent all indigent misdemeanants . . . These figures are relatively insignificant when compared to the estimated 335,200 attorneys in the United States . . . a number which is projected to double by the year 1985. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the "estimated 14,500 average annual openings." *Argersinger* v. *Hamlin*, 407 U.S. 23, 33 n.7 (1972).

ready and willing to represent criminal defendants, despite § 1983 exposure. *See* Mallen, *supra*, 14 Am. Crim. L. Rev. at 69.

Chief Judge Bazelon has noted that the number of criminal malpractice suits "is not at all significant now." *Bazelon, supra*, 42 U. Cin. L. Rev. at 17. Another commentator stated that "there have been few malpractice suits brought against criminal attorneys, and thus far, the number of successful suits has been miniscule." Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, Wis. L. Rev. 473, 515 n.175 (1982). *See also* Kaus and Mallen, *The Misguiding Hand of Counsel—Reflections on Criminal Malpractice*, 21 UCLA L. Rev. 1191, 1193 (1974).

A denial of public defender immunity will not affect the retention of defenders. Lawyers hired by the Legal Services Corporation work under many of the same conditions as public defenders, e.g., low pay, high case-loads, a clientele that is exclusively indigent, and the threat of potential § 1983 lawsuits. Handler, Hollingsworth and Erlanger, *Lawyers and the Pursuit of Legal Rights*, 178 (1978). The Handler, *et al* study pointed to "structural reasons why lawyers . . . leave Legal Services, [that are] not necessarily related to a change in or lack of commitment. Working conditions in Legal Services offices are poor. Lawyers are inundated with masses of cases that cause feelings of monotony and the conviction that legal skills are being wasted on routine tasks." *Id.* The defense of potential § 1983 suits is not a primary nor even a substantial reason that criminal defense attorneys change employment situations.

Finally, petitioners' assertion that absolute immunity would encourage more competent attorneys to apply for public defender positions is specious. It is the mediocre

lawyer who must fear malpractice liability, and who will find a position that enjoys absolute immunity particularly attractive. Tort liability encourages adherence to prescribed standards of conduct, as evidenced by the American Bar Association's view that attorney efforts to limit liability to clients is unethical. *See* Model Code of Professional Responsibility DR 6-102.

Criminal defendants are already subjected to inferior legal representation. For instance, Chief Judge Bazelon explained that "what I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed by the Sixth Amendment." Bazelon, *supra*, U. Cin. L. Rev. at 2. The National Legal Aid and Defender Association has also concluded that "the scope of representation provided for indigent defendants in many jurisdictions does not even meet specific constitutional directives of the Supreme Court." National Legal Aid and Defender Association, *The Other Face of Justice* 70 (1973).

Indigent criminal defendants have echoed these concerns, expressing the belief that appointed counsel are inferior substitutes for retained attorneys. *See* Casper, *Criminal Courts: The Defendant's Perspective* 31, 81 (1978). Public defender immunity would only work to exacerbate an already intolerable situation.

CONCLUSION

The broad remedial purpose of § 1983, combined with legal history, common law principles, and public policy considerations mandate that public defenders should not gain governmental or quasi-judicial immunity under § 1983 because they perform a purely private function.

The decision of the Court of Appeals for the Ninth Circuit, which held that public defenders do not have immunity under § 1983, should be affirmed.

Respectfully submitted,

RICHARD A. SLOTTEE
CRAIG K. EDWARDS
Counsel for Respondents

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No. 82-1988

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender of Douglas County, Oregon, and

GARY BABCOCK, Public Defender of the State of Oregon,

Petitioners,

v.

BILLY IRL GLOVER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
***JAMES E. MOUNTAIN, JR.**
Solicitor General
MICHAEL D. REYNOLDS
WILLIAM F. NESSLY, JR.
ROY E. PULVERS
Assistant Attorneys General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

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REPLY BRIEF

ARGUMENT

I. Respondent Glover's arguments against absolute immunity of public defenders from § 1983 liability fundamentally are flawed by his failure to acknowledge that significant constitutional and public interests served by public defenders would be harmed by imposition of § 1983 liability.

Glover's opposition to public defender immunity in § 1983 actions reflects a myopic view of the public defender function. Glover recognizes that "[p]ublic defender programs were largely created after 1963, in response to . . . *Gideon v. Wainwright*, 372 U.S. 335 (1963) . . ." (Respondent's Brief at 9). He does not perceive, however, that public defenders provide constitutionally required defense services to the poor in particular ways that merit special protection.

Public defender programs enhance the abilities of states efficiently to provide effective assistance of counsel to large numbers of indigents because economies of time and money are inherent in the programs.[1] Moreover, the significance of an institu-

[1] *E.g.*, The New Hampshire Attorney General's Statistical Analysis Center found public defenders 30 percent less expensive per case than assigned counsel, LEFSTEIN, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE FOR THE POOR, May 1982, Appendix A; Colorado court-

(Continued on next page)

tionalized public defender office, as contrasted with the ad hoc appointment of private counsel, is more than theoretical. Public defender programs offer individual clients special benefits not otherwise available. Under Oregon law, Or. Rev. Stat. §§ 151.030 and 151.220(5) (Petitioners' Brief at App. 3), the practice of defenders Tower and Babcock is limited to indigent criminal defense. Their clients, therefore, receive the services of attorneys who are experienced specialists in criminal law and and who are likely to be professionally and personally committed to indigent criminal defense. By contrast, private court-appointed counsel are often young and inexperienced. Approximately only one percent are criminal specialists and over 30 percent have no criminal jury trial experience whatsoever. BENNER & NEARY, THE OTHER FACE OF JUSTICE 44-45 (1973).

Public defenders, who practice in the institutionalized setting contemplated by laws such as those of the State of Oregon, are in the best position to identify and develop defense issues relating to particular classes of crimes and criminal procedures. Such defenders are exposed to masses of cases and,

(Continued from previous page)

appointed counsel costs are 95.1 percent higher than the public defender's costs per case, *ibid.*

See also Criminal Defense Technical Assistance Project, Abt Associates Inc., San Diego County Office of Defender Services: Evaluation and Recommendations, December 1981, unpublished study, 41, "In virtually every community we have visited where a cost comparision has been conducted between a public defender program and a private bar program, the public defender program is less costly."

therefore possess a strategic perspective on prosecutorial practices, judicial procedures and personalities, and recent criminal caselaw developments. Public defenders can utilize this experience and expertise in defending complex and unpopular cases and in developing special procedures for application in broad ranges of cases. In addition, some public defender offices have staff investigators and social workers, who facilitate key elements of an effective criminal defense. BENNER & NEARY, THE OTHER FACE OF JUSTICE 21. Public defender implementation of special procedures can yield special benefits. Public defenders often see their clients more quickly after arrest and take less time between phases of the criminal justice process than private court-appointed counsel. Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey & Analysis*, 10 Am. Crim. L. Bull. 161, 171 (1974); BENNER & NEARY, THE OTHER FACE OF JUSTICE 24, 46.

Public defender systems also play an important role in the continued funding of indigent defense services. Public defenders are an organized political presence in the legislative funding process. As a knowledgeable and identifiable office that produces effective delivery of required services, the public defender is in the best position to argue for increased funding for expanded services.

State and county public defender programs thus provide courts with an institutional resource of defense counsel that benefit indigent defendants and the criminal justice system in numerous and unique ways. Benner's survey conclusions are not surprising:

> "The full-time defender system was preferred by the greatest number of participants in the criminal justice system, including judges in jurisdictions presently utilizing assigned counsel systems." Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 Am. Crim. L. Rev. 667, 671 (1975); *see* BENNER & NEARY, THE OTHER FACE OF JUSTICE Tables 92, 94, 101.

Moreover, the National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, § 13.5 (1973), recommended that every jurisdiction provide indigent defense services through a "full-time public defender organization."

The capacity of public defender programs to provide effective assistance of counsel to indigents is consistently endangered, however, because of ever present high caseloads and limited financial resources. Glover recognizes neither this precarious balance nor the role played by public defenders in the comprehensive state system for providing constitutionally mandated defense services. Glover, therefore, does not appreciate how seriously the imposition of § 1983 liability on public defenders

would threaten to divert critically scarce, fixed resources away from indigent criminal defense. Instead, he asserts that the threat of resource-devouring suits is exaggerated (Respondent's Brief at 23-26). Respondent is wrong: The threat is substantial.

The Eisenberg study, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 535 n. 237, 555 (1982), documented that in one federal district studied, approximately six percent of the civil rights petitions filed by state prisoners in 1975 and in 1976 complained of problems with legal representation. (*See* Respondent's Brief at 24). If this percentage, advanced by respondent, reflects a national average, the *16,741* civil rights petitions filed by state prisoners in federal courts in 1982 (compared with 12,397 only two years before) would yield some *1,000 annual suits in federal courts*—or .5 percent of the total federal civil filings—which allege civil rights deprivations due to actions of defense counsel. *See* 1982 Annual Report of the Director of the Administrative Office of the United States Courts 92, 103. Petitioners have previously noted that many of these claims relating to the assistance of counsel can and would be recharacterized as conspiracy claims. (Petitioners' Brief at 28, 29 & n. 8). Plainly, the existence and future threat of suit is genuine.

Respondent also claims that the fact most suits do not reach trial indicates that mere reference to the number of suits "paint[s] a distorted picture." (Respondent's Brief at 24). However, the primary problem facing the public defender and the judicial system is not the number of cases which go to trial. Respondent overlooks the cost of pretrial motions, discovery, and all other financial and human resource diversions inherent in defense of a suit whether or not it goes to trial. (Petitioners' Brief at 30-32, 40-43). Further it must be expected that a significant number of prisoner suits will proceed to trial. Somewhere between three percent (Respondent's Brief at 24) and 5.8 percent (1975 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-4) of prisoner civil rights suits reach trial. This range is roughly 50 percent of the 8.4 percent of all civil cases which reach trial. *Id.* at 210. The comparison demonstrates that conspiracy claims against public defenders do present a potential for resource drain similar to that caused by other civil suits.

The fact that somewhat fewer prisoner § 1983 suits go to trial probably reflects the predictably high rate of frivolous claims. *See, e.g., Minns v. Paul*, 542 F.2d 899, 902 (4th Cir. 1976); Eisenberg, *supra* p. 5, at 544. Judges, prosecutors and witnesses all possess immunity based, in part, on the common

sense recognition that they are magnets for vindictive and meritless suits. If public defenders are not granted immunity, they will be the last § 1983 target left for venting the frustration of the convicted. Public defender organizations face substantial exposure to suit simply because of their caseload volume and the fact they deal exclusively in indigent defense. Exposure of public defenders to § 1983 suits poses a real and substantial prospect of diversion of public defender resources.[2]

Glover fails, therefore, to acknowledge what must be deemed apparent: Imposition of § 1983 liability on public defenders would actually jeopardize states' abilities to provide effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments—an interest which § 1983 seeks to protect. Consequently, the states would be disinclined to experiment with innovative systems such as public defender programs, designed to improve the rendition of defense services to the poor.

These anomalies in the imposition § 1983 liability on public defenders would not have escaped the attention of the 1871 Congress. In this context, the

[2]Respondent and amicus mistakenly assert that we have argued that exposure to liability itself will hinder recruitment and retention of public defenders. (Respondent's Brief at 28; Amicus Brief at 17). Our point is simply that low salaries, caseload pressure, lack of support staff, and poor working conditions combine to hinder recruitment and retention. The cost of these § 1983 suits will exert more pressure on a strained system and exacerbate the problem. (Petitioners' Brief at 35).

policy of § 1983 to provide redress for deprivations of civil rights secured by the Fourteenth Amendment conflicts with the policy of the Fourteenth Amendment that states must provide adequate resources to guarantee indigent criminal defendants the effective assistance of counsel. Given this conflict, it is unlikely that the 1871 Congress would have intended to impose the costs of § 1983 liability on public defenders alleged to have acted under color of state law. A construction of § 1983 to require imposition of liability on public defenders would injure the state's systems for providing legal services to the poor. It could easily deprive the states and individual criminal defendants of the special benefits of an effective public defender system. Glover is simply wrong in asserting that the scope and purpose of § 1983 defy the creation of an immunity defense for public defenders. (Respondent's Brief at 6).

Moreover, contrary to Glover's assertion (Respondent's Brief at 7), petitioner's analysis of the legislative history of § 1983 and Congress' probable acceptance of immunity under the facts of this case cannot be dismissed as "stilted." *Briscoe v. Lahue*, ___ U.S. ___ , 103 S.Ct. 1108 (1983), directly recognized that the legislative history of § 1983 did not warrant the conclusion that the 1871 Congress, familiar with common-law immunity policies,

intended to abrogate those policies in § 1983 actions brought to remedy unjust criminal convictions. *See id.* 103 S.Ct. at 1113, 1118. *Briscoe* demonstrates that the broad wording of § 1983 cannot foreclose the recognition of immunity where its application comports with traditional immunity policies and is supported by a sufficient public interest that the immunity protects. *See Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).[3] In short, immunity of public defenders is wholly compatible with the purposes of § 1983.

II. Glover's contentions that absolute immunity cannot be afforded public defenders have no basis either in the common law or in recent decisions of this Court.

Glover argues that the public defender is not a government official, and for that reason cannot be

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[3]This Court has consistently relied upon the historical and legal context of the enactment of 42 U.S.C. § 1983 in construing the statute. *See, e.g., Briscoe*, 103 S.Ct. at 1118; *Imbler*, 424 U.S. at 421; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). This approach permits an appropriate accommodation of the broad wording which reflects the emergency nature of the Act, and the limited, specific incentive for its passage—the racist lawlessness of the post-Civil War South.

> "Any application of section 1983 beyond the confines of racial problems must seek justification in something more than the intent of section 1983's framers. A case may be made for such extensions, but they are beyond the core concerns underlying section 1983's enactment." Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982). *See also*, Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. L. Rev. 526, 541 (1977).

afforded any form of immunity. (Respondent's Brief at 10, 17-18). Glover's reasoning is fallacious.

A defendant need not exercise governmental power or hold an official title in order to assert immunity. *Briscoe v. Lahue*, *supra*, 103 S.Ct. at 1119, admonished "that immunity analysis rests on functional categories, not on the status of the defendant." Although the defendants in *Briscoe* were police officers, the Court commenced its examination of the immunity issue "by considering the potential liability of lay witnesses . . . ." 103 S.Ct. at 1112. Noting that private witnesses could act under color of state law by conspiring with state officials, the Court found it necessary "to go beyond the 'color of law' analysis to consider whether private witnesses may ever be held liable for damages under § 1983." 103 S.Ct. at 1113 n. 7. The Court examined the immunity of private witnesses, found that it obtained, and approached the question of police officer immunity by inquiring whether there existed a basis for creating an exception from the doctrine of lay witness immunity for police officers. *See id.* 103 S.Ct. at 1119-1120. *Briscoe* necessarily established that official status is not a condition to the assertion of immunity. 103 S.Ct. at 1116.

Glover maintains that the common-law privilege against defamation actions accorded attorneys was

limited solely to an advocate's conduct in examining witnesses and making argument in the courtroom. (Respondent's Brief at 12). This attempt to restrict the common-law immunity to attorney utterances that are made in open court lacks support.[4] Comments of counsel, even if made outside of judicial proceedings, remain privileged so long as they are made in connection with probable or existing litigation. *See Johnston v. Cartwright*, 355 F.2d 32, 37-38 (8th Cir. 1966). According to the Restatement:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communcations preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." Restatement (Second) of Torts § 586 (1976).

The common-law immunities afforded § 1983 attorney defendants are broad enough to embrace conduct

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[4]The authority Glover cites for this proposition does not describe the attorney's common-law immunity from defamation actions as limited to the examination of witnesses and making of arguments. *See* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 482-483 (1909).

Moreover, at the time § 1983 was enacted, the courts recognized that the defamation immunity of attorneys was based upon a broad public policy which parallels the public interest in encouraging a defender to make legal decisions free of the fetters of potential liability. The true purpose of the immunity was to enhance the public interest in an unrestricted flow of evidence and argument in order to aid the ascertainment of truth. *See Marsh v. Ellsworth*, 50 N.Y. 309, 312 (1872); *Shelfer v. Gooding*, 47 N.C. 175, 179-180 (1855).

Thus, the prosecutor and the defender at common law enjoyed the same absolute defense, and the defense was founded not merely upon the need to protect the private interests of litigants, but upon the vital public interest in the integrity of the judicial process itself.

which occurs even prior to litigation if that conduct bears a relation to the judicial proceedings.

Glover also argues that the limits of an attorney's common law immunity establish the limits of a public defender's § 1983 immunity (Respondent's Brief at 12-13). However, it follows from the facts and rationale of *Imbler v. Pachtman*, *supra*, that the damage immunity under 42 U.S.C. § 1983 need not be absolutely congruent with a pre-existing common-law immunity. In *Imbler*, Mr. Justice White concluded that at common law, a prosecutor had absolute damage immunity only from malicious prosecution actions (*i.e.*, for the decision to prosecute) and from defamation suits arising from remarks made during and pertinent to judicial proceedings. *Imbler v. Pachtman*, 424 U.S. at 441 (White, J., concurring in the judgment). Nevertheless, the Court held that a prosecutor's immunity from a § 1983 damage action extends beyond the reach of the particular common-law immunities available. The immunity protection extends not only to charges that the prosecutor intentionally had introduced false testimony in a trial, but also to allegations that the prosecutor suppressed evidence favorable to the accused. Indeed, *Imbler* concludes that damage immunity attaches to all prosecutorial conduct which is "intimately associated with the judicial phase of the criminal process," *id.*, 424 U.S. at 430. Glover's

attempt to limit a public defender's § 1983 immunity to contours of the defamation privilege should fail.[5]

Respondent Glover and amici on his behalf [National Association of Criminal Defense Lawyers and Oregon Criminal Defense Lawyers Association] persistently assert that public defenders are no different from any other defense counsel and therefore should be treated no differently (*e.g.*, Respondent's Brief at 8-9; Amicus Brief at 8). This assertion stems from a superficial application and basic

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[5]Contrary to respondent's contention, (Respondent's Brief at 16-17), *Imbler* also concludes that the presence of conspiratorial conduct, if undertaken in intimate association with the judicial process, would not bring that conduct outside the judicial process or cause that behavior to exceed the scope of a defender's protected discretionary functions. *Imbler*, 424 U.S. at 415-416, 430.

Briscoe v. Lahue, *supra*, demonstrates even more strongly that allegations of conspiracy should be insufficient to defeat the judicial character of a public defender's defense functions or to place them outside the scope of defense duties which should be privileged. The analysis of lay witness immunity in *Briscoe* proceeded on the assumption that a conspiracy between a witness and a state actor had been pleaded. 103 S.Ct. at 1113 n. 7. Nevertheless, in *Briscoe* this Court held that a witness who conspired to testify falsely acted within the scope of the witness' function and, therefore, was entitled to immunity. Glover's contention that conspiratorial conduct is necessarily outside the reach of immunity, is contrary to this Court's recent decisions as well as traditional precedents:

> "'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. Gregoire v Biddle (CA2 NY) 177 F2d 579, 581." *Barr v. Matteo*, 360 U.S. 564, 572 (1959).

misapprehension of the statements of the Court in *Polk County v. Dodson*, 454 U.S. 312, 318-319 & n. 8 (1981); *Branti v. Finkel*, 445 U.S. 507, 519 (1980); and *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979). Those cases only make the point that a public defender's primary responsibility, like that of any defense counsel, is to serve the undivided interests of his or her individual client. Petitioners Tower and Babcock have never suggested otherwise. (Petitioners' Brief at 21).

Petitioners contend that the public defender performs a unique judgmental function in the judicial system basically comparable to that of the prosecutor which entitles the public defender to § 1983 immunity. (Petitioners' Brief at 21-24). This assertion is compatible with the recognition that a public defender owes primary responsibility to his individual client. In *Jones v. Barnes*, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 987 (1983) this Court held that criminal appellate counsel may exercise his own professional judgment and need *not* assert all colorable issues requested by the client. *Jones* recognizes that an attorney's responsibility to exercise his own professional judgment is not inconsistent with his duty to his client. Absolute immunity of public defenders from § 1983 liability is necessary to protect the defenders' exercise of such judgment. More than other defense attorneys, the

public defender will be called upon to decide which issues to press on behalf of his clients and whether issues are colorable or frivolous. As this case demonstrates, the public defender's exercise of such judgment readily can engender the filing of a federal civil rights suit by an unjustifiably disgruntled client. Recognition that a public defender's primary responsibility is to his client, thus, is in no way incompatible with public defender immunity under § 1983.

III. Glover's assertion that public defender immunity would deprive indigent criminal defendants of equal protection of law is the product of erroneous constitutional analysis.

Respondent argues that public defender immunity "will inevitably result in a denial of equal protection for certain indigent defendants in Oregon" because indigents represented by public defenders will be foreclosed from one avenue of relief for conspiratorial conduct by their defense counsel, whereas indigents represented by court-appointed counsel will not be similarly foreclosed. (Respondent's Brief at 19). Respondent's argument assumes too much and is analytically unsound.

Respondent assumes, first, that court-appointed counsel are not entitled to immunity under § 1983 in addition to public defenders. This Court has not declared that private, court-appointed lawyers are

subject to liability under § 1983 if they conspire with the judge or prosecutor.

Even assuming that public defenders were immune from liability whereas court-appointed counsel were not, recognition of public defender immunity from § 1983 liability accepts a line drawn not by the states but by the United States Congress. In such cases the Fifth Amendment Due Process Clause rather than the Fourteenth Amendment is relevant for purposes of addressing equal protection concerns. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The equal protection analysis apparently is the same under either constitutional provision. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The appropriate inquiry in this case is whether the line which Congress has drawn between public defenders and other defense counsel "rationally furthers some legitimate, articulated [governmental] purpose. . . ." *San Antonio v. Rodriguez*, 411 U.S. 1, 17 (1973).[6]

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[6]Respondent does not contend that a strict scrutiny inquiry is required, and for good reason. Recognition of immunity for public defenders does not operate "to the disadvantage of some suspect class or impinge[s] upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17. The "right" which would be denied by a grant of public defender immunity is access to one particular remedy to redress a grievance. When Congress enacts a reform measure that provides relief to some but not all persons, the inquiry is whether Congress' decision to stop where it did was rational. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 656-657 (1966) (federal law exempting from English literacy tests for voting persons educated in American flag schools, where language of instruction was other than English, does not constitute forbidden discrimination against persons educated in schools beyond territorial

(Continued on next page)

The Congressional interest is strong: To enable states to provide the best and most efficient delivery of constitutionally required indigent defense services. As demonstrated in detail in this brief and in petitioners' opening brief, public defenders best further that interest and especially require an immunity. Recognizing an immunity from § 1983 liability for public defenders is a rational and effective means for Congress to insure the continued efficacious provision of constitutionally required defense.

Glover appears also to assert that individual states would deprive indigents represented by public defenders of equal protection by utilizing a public defender system in some regions and not in others. Glover assumes that a state's decision to establish or utilize public defenders in one area and not in another would be an arbitrary one. There are no facts in this record to support such a contention. If

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(Continued from previous page)

limits of the United States). This Court has aptly noted that "every reform that benefits some more than others may be criticized for what it fails to accomplish," but that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio v. Rodriguez*, *supra*, 411 U.S. at 39, 33.

Respondent attempts to argue that a fundamental right is implicated because public defender immunity would diminish attorney accountability and consequently affect the quality of representation and the Sixth Amendment right to counsel. (Respondent's Brief at 20). Diminished accountability requires actual diminution either in quality of representation or attorney responsibility. This Court has rejected the idea that an immunity without more produces lax standards. *Barr v. Matteo*, *supra*, 360 U.S. at 576. This Court has also noted that the potent remaining checks on lawyer misconduct undermine the argument that federal civil liability is required to insure attorney responsibility. *Imbler v. Pachtman*, *supra*, 424 U.S. at 429.

Congress had a rational basis for granting immunity to public defenders, such rationale should carry forward and insulate the states from a claim that the choice of different methods of providing indigent defense was without a rational basis. Moreover, it is apparent from petitioners' arguments in the opening brief and in this brief that public defender programs would be utilized to facilitate the state's provision of the most effective assistance of counsel to indigents. Recognition of public defender immunity from § 1983 liability serves the constitution and does not offend equal protection.

CONCLUSION

States such as Oregon have experimented with various methods of providing constitutionally mandated legal services to indigent criminal defendants. States have determined that public defender programs are the most efficient and economical system for providing such services in an era of declining governmental resources and increased demand for state-paid legal services. Yet public defender systems face collapse under the weight of increased physical and financial costs if public defenders are not accorded immunity from § 1983 liability for actions performed in the course of representing their clients. Ironically, § 1983 liability of public defenders will discourage the states from continuing to seek better ways to provide defense

services and will compromise the state's abilities to provide counsel that is as effective as it is efficient. Sadly, the critical diversion of resources would be occasioned, in all likelihood, by spurious claims of ineffective assistance of counsel recast in vague conspiracy allegations by pro se clients, unjustifiably upset with their criminal convictions. However, thoughtful consideration of legislative history and policies underlying pertinent immunities compels recognition of a rule of absolute immunity from § 1983 liability for public defenders. The contrary decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
MICHAEL D. REYNOLDS
WILLIAM F. NESSLY, JR.
ROY E. PULVERS
Assistant Attorneys General
Counsel for Petitioners

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No. 82-1988

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BRUCE TOWER, Public Defender of Douglas County, Oregon, and GARY BABCOCK, Public Defender of the State of Oregon,

Petitioners,

v.

BILLY IRL GROVER,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

Appeal from the United States Court of Appeals, Ninth Circuit

JIM SMITH
Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel
COUNSEL OF RECORD

JAMES A. PETERS
ERIC J. TAYLOR
Assistant Attorneys General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

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INTEREST OF AMICUS CURIAE

Florida Attorney General Jim Smith appears as amicus pursuant to Rule 36.4, Rules of the Supreme Court of the United States, to represent Florida and its public defenders. The absence of absolute immunity under §42 U.S.C. §1983 will impair Florida's criminal judicial processes, discourage recruitment of new public defenders, and encourage experienced public defenders to resign from or compromise their positions. Florida is apprehensive that the ability of its criminal courts to operate efficiently will be jeopardized if its public defenders and appointed counsel are exposed to personal liability and defense expenses in federal civil rights litigation.

This brief is submitted by Florida, by and through its Attorney General, in support of the Petitioners, Bruce Tower and Gary Babcock.

ARGUMENT SUMMARY

PUBLIC DEFENDERS SHOULD BE AFFORDED ABSOLUTE IMMUNITY FROM CLAIMS FOR DAMAGES UNDER 42 U.S.C. §1983.

The question presented is:

> Whether 42 U.S.C. §1983 authorizes a convicted person to assert a claim for damages against the public defenders who represented him at his criminal trial and appeal, on a theory that the public defenders deprived him of his constitutional rights pursuant to a conspiracy with state judges and administrative officials.

This Court has not addressed this issue in its earlier decisions. Ferri v. Ackerman, 444 U.S. 193 (1979), determined under federal law that a public defender was not entitled to absolute immunity in a state malpractice action. In Polk County v. Dodson, 454 U.S. 312 (1981), this Court found that a public defender does not act under color of state law when performing the traditional functions of defense counsel. 454 U.S. at 317, n.4.

Florida urges this Court to apply the reasoning of Briscoe v. Lahue, ___ U.S. ___ 75 L.Ed.2d 96 (1983), Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1970), and Black v. Bayer, 672 F.2d 309 (3d Cir. 1982) and find that public defenders, whether state employed or appointed, enjoy the same immunity from liability under 42 U.S.C. §1983 as judges, prosecutors and witnesses.

I.

THIS COURT'S HOLDING IN FERRI V. ACKERMAN IS NOT CONTROLLING IN THIS CASE.

The Ninth Circuit Court of Appeals decision below relied upon and applied this Court's decision in Ferri to find Petitioners were not entitled to immunity under 42 U.S.C. §1983. Florida submits that the Ninth Circuit erroneously applied the Ferri reasoning to the facts of this case.

The issue in Ferri was whether an attorney appointed to represent a criminal defendant in a federal prosecution was entitled under federal law, to absolute immunity from civil action in a later state malpractice action. This Court found that the attorney was not so entitled to immunity, "[F]or where a state law creates a cause of action, the State is free to define the defenses to that claim,

including the defense of immunity . . ." Ferri v. Ackerman, 454 U.S. at 198.

In contrast, this case does not present a state malpractice claim; it presents an alleged civil rights violation under 42 U.S.C. §1983. This is a "federal" cause of action subject to "federal" defenses to be adjudicated in federal court. Ferri did not decide the scope of this federal cause of action or the extent to which §1983 causes may be limited by immunity defenses. Since Ferri did not decide the issue presented here, its application by the Ninth Circuit was in error. It should not be utilized as controlling authority to determine this case.

II.

POLICY CONSIDERATIONS THAT GRANT IMMUNITY TO JUDGES, PROSECUTORS AND WITNESSES ALSO APPLY TO PUBLIC DEFENDERS.

This Court has found, under common law, absolute immunity for all persons who are an integral part of the judicial process. Briscoe v. Lahue, supra. Reasons for this position lie in overriding public policy considerations.

Pierson v. Ray, 386 U.S. 465 (1967), affirmed the longstanding common law principle that judges are immune from civil liability for acts performed in the course of their official functions. It expressly held that the Civil Rights Act of 1871, 42 U.S.C. §1983, did not abolish judicial immunity:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it

> adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation. 386 U.S. at 553-54.

The Court upheld that principle in Stump v. Sparkman, 435 U.S. 349 (1978), reh. denied, 436 U.S. 951 (1978), finding an exception "only" where a judge acts in complete absence of all jurisdiction.

Consistent with this immunity principle, Imbler v. Pachtman, 424 U.S. 409

(1976), earlier addressed the civil liability of a state prosecutor and held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983." 424 U.S. at 431.

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.
>
> * * *
>
> If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office

> would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf., Bradley v. Fisher, 13 Wall, at 348, 20 L.Ed. 646; Pierson v. Ray, 386 U.S., at 554, 18 L.Ed.2d 288, 87 S.Ct. 1213. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law. 424 U.S. at 422-25.

This Court recognized that absolute immunity was applicable even where the prosecutor used perjured testimony, withheld exculpatory information, or failed to make full disclosure of all facts in doubt in the State's testimony.

In its pre-Ferri and pre-Polk County decision in Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978), the Seventh Circuit recognized these policy considerations when

it held public defenders are absolutely immune from §1983 liability:

> Those considerations involve the exercise of complete professionalism and include "the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be served." (citation omitted). These kinds of decisions, while similar to those of a prosecutor, are not of quasi-judicial nature as are those of the prosecutor. Yet these considerations set the public defender apart from other state agents and officials as well.

Most recently, this Court in Briscoe v. Lahue, ___ U.S. ___, 75 L.Ed.2d 96 (1983), held that witnesses are also entitled to absolute immunity. Briscoe follows immunity principles stated in Pierson and in Imbler. The decision is, again, based on common-law and public policy considerations to protect the judicial process.

III.

ABSOLUTE IMMUNITY SHOULD ALSO APPLY TO PUBLIC DEFENDERS.

The rationale of prior absolute immunity cases governed the disposition of immunity for witnesses, Briscoe v. Lahue, 75 L.Ed.2d at 114. That rationale should also govern immunity of public defenders.

Judges, prosecutors and witnesses are essential to the judicial process. So too are public defenders, whether state employed or court appointed. Under the Sixth Amendment all accused are entitled to counsel. That counsel must be free to utilize its time, best professional training and experience in its defenses:

> [D]efense counsel best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'

Polk County v. Dodson, 454 U.S. 318, 319. Without defense counsel's freedom to act,

the judicial process would be hampered. One way to hamper the public defender would be exposure to vexatious §1983 suits (and potential liability) filed by disgruntled former clients.

Immunity is based, in part, on the need to protect the judicial process from harassment and to maintain its integrity. This Court recognized that concern in Imbler v. Pachtman, supra:

> harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

424 U.S. at 423. This Court further found in Bricoe v. Lahue, supra:

> A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective and undistorted evidence."

75 L.Ed.2d at 106. These same considerations apply to public defenders.

While defending their clients, public defenders must be free to exercise their best professional judgment without interference or without fear of reprisal by lawsuits challenging his decisions. §1983 litigation against public defenders would have a profound effect on them. It would interfere with the defenders' independent judgment. It might cause counsel to shade decisions, and attempt frivolous tactics to appease the client. The quality and credibility of the defense would suffer accordingly. It would also interfere with pending defenses in other criminal cases as time and money would be expended in pursuit of frivolous criminal defenses and in the defenses of these §1983 civil actions. Even the most frivolous of §1983 claims require some defense expenditure. The

overall result would be a dilution of defenses of indigent defendants. Consequently, absolute immunity is necessary for the public defender for "[A]bsolute immunity is . . . necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz v. Economou, 438 U.S. 478, 512 (1978). Clearly, public defenders are included among those advocates necessary to insure the integrity of the judicial system.

Further, most of the claims that would be brought under §1983 against a public defender, like Respondent's claim, are essentially malpractice claims. This Court has never allowed mere negligence claims to rise to the level of a constitutional deprivation. Parratt v. Taylor, 451 U.S. 527 (1981). Analogous are §1983 actions

against prison physicians. In Estelle v. Gamble, 429 U.S. 97, 106 (1976), this Court declined to recognize negligent medical treatment as a civil rights violation:

> . . . a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment . . . in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to a serious medical need. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.

This Court has not permitted medical negligence to rise to the level of a constitutionally protected violation. Public policy, the need for insuring the integrity of the judicial system, preventing the filing of harassing suits by disgruntled clients in federal court, dictate that negligence by a public defender should not also be elevated to a constitutionally protected status.

IV.

THE DECISION OF THE THIRD CIRCUIT IN BLACK V. BAYER WAS CORRECT.

The only Court to decide this issue since Ferri v. Ackerman, supra, and Polk County v. Dodson, supra, is the Third Circuit. In Black v. Bayer, 672 F.2d 309 (3d Cir. 1982), defendant public defenders included both state employed and court appointed counsel. The court found no reason for different results based on the nature of employment. Holding that public defenders, acting within the scope of their professional duties, were absolutely immune from civil liability under §1983, the court reaffirmed the rule of Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973):

> To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording the minutes, the

> presiding judge, and counsel of co-defendant, privately retained or court-appointed, would be to discourage recruitment of sensitive and thoughtful members of the bar. Complaints under the Civil Rights Act, like the one at bar, are usually pro se. These receive special treatment, favorable to plaintiff. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594 [595] 30 L.Ed.2d 652 (1972). Except where patently frivolous, they may be filed without the payment of a filing fee by indigents. Unlike complaints sounding in common law or statutory tort, public policy dictates that they be broadly interpreted in favor of inclusion, rather than exclusion. Valle v. Stengel, 1976 F.2d 697, 702 (3d Cir. 1949). To deny immunity to the Public Defender and expose him to this potential liability would not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions.

Black, at 319, quoting Brown v. Joseph.

This is a real concern in Florida with its large prison population. Records of the United States District Court for the Middle District of Florida evidences massive §1983 prisoner litigation. If this

Court were to permit public defenders to be exposed to potential §1983 liability, sentenced prisoners would have other targets for their vindictive litigation. As noted in Robinson at 410:

> [t]he experience of the federal courts in federal habeas corpus and §1983 litigation demonstrate that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties.

For an example of the proliferation of such frivolous cases one prisoner can produce, see Procup v. Strickland, 567 F.Supp. 146 (M.D. Fla. 1983).

The Third Circuit recognized that both time and money would be diverted from the public defender's primary duty, to defend indigents, 672 F.2d 319. Accused indigents deserve the public defender's full attention to their cases. Precious time taken from the criminal defense would lead to ineffective assistance of counsel charges and related appeals.

As noted in Black, even without a §1983 remedy, the criminal defendant has many other avenues to seek redress if there was ineffective assistance or malpractice, 672 F.2d 320. A convicted criminal defendant can raise these issues on appeal or at other post-trial proceedings, including state and federal habeas corpus petitions. He also may present a state malpractice claim. Or, he may file a complaint with the state bar.

This Court's recognition that public defenders are entitled from absolute immunity to civil rights suits will not leave the client, convicted or not, without a remedy. Rather, it will direct that suit into traditional forums for review.

CONCLUSION

Florida submits that the Ninth Circuit Court of Appeals misapplied this Court's decisions when it decided that public defender liability did not exist under 42 U.S.C. §1983. The decisions and analyses of the Third Circuit in Black v. Bayer, and of the Seventh Circuit in Robinson v. Bergstrom, are correct. Policy considerations dictate that public defenders have the same immunity from civil process as judges, prosecutors and witnesses. Public defenders must be absolutely immune from civil liability under 42 U.S.C. §1983 for all acts done within the scope of their

professional duties. The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

JIM SMITH
Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel

JAMES A. PETERS
Assistant Attorney General

ERIC J. TAYLOR
Assistant Attorney General

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

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No. 82-1988

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender
of Douglas County, Oregon, and
GARY BABCOCK, Public Defender
of the State of Oregon,
Petitioners,

v.

BILLY IRL GLOVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF AFFIRMANCE

*JOHN S. RANSOM
DIANE L. ALESSI
Ransom, Blackman & Simson
330 American Bank Bldg.
621 S.W. Morrison Street
Portland, Oregon 97205
(503) 228-0487
Counsel for Amici Curiae,
National Association of
Criminal Defense Lawyers
and Oregon Criminal Defense
Lawyers Association

*Counsel of Record

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AMICUS BRIEF

of the

NATIONAL ASSOCIATION OF

CRIMINAL DEFENSE LAWYERS

and the

OREGON CRIMINAL DEFENSE

LAWYERS ASSOCIATION

INTRODUCTION

The National Association of Criminal Defense Lawyers (NACDL) and the Oregon Criminal Defense Lawyers Association (OCDLA) submit this brief in support of the holding of the Ninth Circuit Court of Appeals in this matter that respondent has stated a cause of action under 42 U.S.C. § 1983 because public defenders charged with conspiring with state officials in violation of that

statute are not immune from suit. The written consent of the parties to this action to file this brief is on file with the Clerk of the Court.

The NACDL is a District of Columbia non-profit corporation with a membership comprised of more than three thousand lawyers, including representatives of every state. NACDL was founded twenty-five years ago to promote study and research in the field of Criminal Defense Law, to disseminate and advance the knowledge of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of the defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the

protection of individual rights, and the improvement of criminal law, its practices and procedures.

The OCDLA is comprised of nearly 400 criminal defense lawyers, both private and public, and is organized for the purpose of advocating the competent defense of citizens accused of crime and advocating the rights and liberties guaranteed by both the Oregon Constitution and the United States Constitution. To that end, OCDLA has conducted seminars and published legal literature to help improve the quality of criminal defense in Oregon.

Both the NACDL and the OCDLA, which recognize that such a position will expose their members to potential civil liability, join respondent in seeking the affirmance of the

decision of the Ninth Circuit Court of Appeals in holding that petitioners, public defenders alleged to have acted under color of state law, are not immune from a civil rights action under 42 U.S.C. § 1983. NACDL and OCDLA have a keen interest in advancing the professionalism of public defenders and court-appointed private counsel, and both associations believe that this Court will be aided by the positions of the only national group and the only Oregon organization which speak solely on behalf of criminal defense attorneys.

Both associations also have an interest in protecting the rights of all of the accused and in insuring that no one is denied these rights on the basis of their indigency, and submit this brief in support of the

indigent accused's equal access to civil courts.

ARGUMENT

Title 42 U.S.C. § 1983 provides that "[e]very person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. Although the statute seemingly creates a species of tort liability that on its face does not immunize anyone from its prohibitions, this Court, in a number of successive cases, has determined that § 1983 is to be read in harmony with general principles of tort immunities and defenses and not in derogation of them. Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Thus, this Court has con-

ferred absolute immunity from suit brought under § 1983 upon judges, Pierson v. Ray, 386 U.S. 547, 554-55, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), and upon prosecutors "in initiating a prosecution and in presenting the State's case", Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Court conferred these immunities, however, based upon the immunity historically accorded the relevant official at common law and the compelling public interests behind it.

The decision to confer absolute immunity upon judges and prosecutors has been partly based upon the belief that if these officials were not granted immunity the exercise of their governmental functions would be severely impeded. The immunity of

judges from liablity for damages within their judicial jurisdiction

> "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Pierson v. Ray, supra, 386 U.S. at 553-54.

This Court also found that denying a prosecutor absolute immunity from civil liability under § 1983 "would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." Imbler v. Pachtman, supra, 424 U.S. at 427-28. There is no such public interest to be served, however, when deciding

upon whether to confer immunity from suit under § 1983 upon criminal defense counsel, whether the attorney is a public defender, court-appointed or privately retained.

Although petitioners expend a great deal of effort attempting to equate the role of the public defender with that of the judge and prosecutor, it is clear that public defenders are not different from other counsel representing their individual clients. In discussing whether an appointed counsel representing a defendant in a federal criminal trial should be entitled to immunity as a "federal officer", this Court noted that

> "[t]here is ... a marked difference between the nature of counsel's responsibilities and those of other officers

of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. *** The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would confict with their resolve to perform their designated functions in a principled fashion.

"In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. *** His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. *** If anything, it provides

> the same incentive for appointed and retained counsel to perform that function competently."
>
> Ferri v. Ackerman, 444 U.S. 193, 202-04, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) (footnotes omitted; emphasis added).

In Ferri, supra, which held that court-appointed counsel is not immune from a malpractice action by his former client, the Court also found that

> "[h]aving concluded that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge, or naval captain, we also conclude that the federal officer immunity doctrine explicated in cases like *** Butz v. Economou, 438 U.S. 478, 47 L.Ed.2d 895, 98 S.Ct. 2894, is simply inapplicable in this case." Id. at 205 (emphasis added).

In addition, the arguments advanced by petitioners for drawing distinctions between public defenders and retained counsel on the question of immunity in reality reflect at best an acceptance of inferior (and therefore unconstitutional) representation for the indigent accused and at worst encouragement of defective assistance of counsel. The litany of horrors paraded before the Court by petitioners - understaffed and underfunded public defender offices already unable to handle the increasing caseload without having to defend against § 1983 litigation - presupposes that the majority of the clients of public defender officer will not receive competent assistance of counsel. Such a rationale for conferring immunity is surely not the

intent of that doctrine and would not serve the public interest. The petitioners' plea that "[f]unding for indigent defense is approaching crisis" is commendable, but a plaint to be made before the legislature rather than this Court.

The inability of public defenders to exercise their professional discretion if exposed to civil liability is equally specious. This "chilling effect" - that public defenders would have difficulty resisting the pressure by their clients to present meritless claims without immunity - is simply nonsense. Along with his or her privately-employed colleagues, the public defender has professional integrity and adheres to the same Canon of

Ethics.[1] To contend that public defenders will be unable to act responsibly towards the court simply due to fear of being sued by the client, although privately-retained counsel apparently will not be so affected, is patently frivolous.

Petitioners also claim that lack of immunity from suits under § 1983 will make it difficult for public defenders to assign priorities among their clients due to limited

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[1] ABA Code of Professional Responsibility states:

> "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B).

time and resources. Of course, this argument ignores the fact that all attorneys must allocate their finite time and resources among their clients, but again, this is not an adequate justification for protection from a § 1983 lawsuit.

Petitioners imply that public defenders are so overburdened with work that they cannot adequately represent some clients without sacrificing the interests of others. While this dilemma may be true in some instances, and for privately-retained counsel as well, to advance it as support for denying compensatory relief to victims of corrupt officials is alarming to anyone concerned with the quality of representation given to an indigent accused. Restricting the remedies

for those individuals injured by overworked and inadequately supported public defender offices is hardly an acceptable response to the problem. As previously noted, the only acceptable response to this problem is for legislatures to insure that public defenders and appointed counsel be given the resources necessary to provide effective assistance of counsel to the indigent accused.

Indeed, petitioners do not include private counsel who is appointed by the court to represent the indigent accused in their arguments for immunity. Yet these attorneys are equally likely to be exposed to a § 1983 action similar to respondent's. Most private attorneys accept court-appointments as a public

service rather than for private gain, as the compensation is rarely adequate.[2/] Unlike most public defender offices, they do not have private investigators or paralegals on their staffs to assist them in adequately representing their clients. They too must allocate their limited time and resources, and would have to expend some of their energy in defending what petitioners have termed "this frivolous litigation." Petitioners' arguments apply equally to private attorneys because, as this Court has noted,

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[2/] The Oregon trial courts are statutorily mandated to compensate attorneys appointed by the court at the rate of $30.00 per hour. ORS 135.055.

> "[e]xcept for the source of payment, [the] relationship [between public defender and client] became identical to that existing between any other lawyer and client. 'Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.' American Bar Association Standards for Criminal Justice, 4-3.9 (2d ed. 1980)." Polk County v. Dodson, 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (footnote omitted).

Perhaps the most appalling argument purported by petitioners, however, is that competent attorneys will not become public defenders or remain in that field due to the potential exposure to § 1983 litigation. This contention unfairly impugns the dedication and abilities of those lawyers who, in obedience to

the standards of our profession and indeed to the commands of our Constitution, elect to defend the indigent accused. In addition, this argument again implicitly accepts as fact the existence of unconstitutional inadequacies in our criminal justice system in providing representation to the poor. If there truly is a problem with attracting and retaining competent attorneys in public defender offices, then the rational solution is to provide better salaries and better working conditions.

Petitioners also note that clients often perceive their public defenders as another arm of the state, not acting on their behalves but in cooperation with the prosecutor. If public defenders are granted immunity in cases such as respon-

dent's, the public defender even more closely resembles the state and the prosecution. Immunity would therefore erode even further the trust and confidence an indigent client has in his public defender, elements which everyone in our profession recognizes as an important factor in providing adequate representation to a client.

CONCLUSION

For the reasons set forth herein, NACDL and OCDLA respectfully join the respondent in urging this Court to affirm the mandate of the Ninth Circuit Court of Appeals and remand the matter to the district court for further proceedings.

Respectfully submitted,

/s/ John S. Ransom

JOHN S. RANSOM

/s/ Diane L. Alessi

DIANE L. ALESSI

Counsel for Amici Curiae

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No. 82-1988-CFX
Status: GRANTED

Title: Bruce Tower, etc., et al. Petitioners
v.
Billy Irl Glover

Docketed:
May 31, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Mountain Jr., James E.

Counsel for respondent: Slottee, Richard A.

Entry	Date	Note	Proceedings and Orders
1	May 31 1983	G	Petition for writ of certiorari filed.
3	Jun 22 1983		Order extending time to file response to petition until July 30, 1983.
4	Jul 28 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Jul 28 1983		Brief of respondent in opposition filed.
6	Aug 3 1983		DISTRIBUTED. September 26, 1983
7	Aug 3 1983		DISTRIBUTED. Sept. 26, 1983. (Motion of respond. Billy I. Glover for lv. to proceed in forma pauperis).
8	Oct 3 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Oct 3 1983		Petition GRANTED.
			**********
11	Nov 17 1983		Order extending time to file brief of petitioner on the merits until November 22, 1983.
12	Nov 21 1983		Joint appendix filed.
13	Nov 18 1983		Brief amicus curiae of Florida filed.
14	Nov 23 1983		Record filed.
15	Nov 22 1983		Brief of petitioners Bruce Tower, et al. filed.
16	Dec 19 1983		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers, et al. filed.
17	Dec 22 1983		Brief of respondent Billy Irl Glover filed.
18	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 22, 1984. (1st case)
19	Jan 19 1984		CIRCULATED.
20	Feb 15 1984	X	Reply brief of petitioner Bruce Tower, et al. filed.
21	Feb 22 1984		ARGUED.